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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 294

CITY OF TEXARKANA, TEXAS, PETITIONER,

vs.

ARKANSAS LOUISIANA GAS COMPANY

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT**

PETITION FOR CERTIORARI FILED AUGUST 22, 1938.

CERTIORARI GRANTED OCTOBER 10, 1938.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 294

CITY OF TEXARKANA, TEXAS, PETITIONER,

vs.

ARKANSAS LOUISIANA GAS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT

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[fol. a]

[Captions omitted]

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**IN DISTRICT COURT OF BOWIE COUNTY, TEXAS,
FIFTH JUDICIAL DISTRICT**

OCTOBER TERM, A. D. 1933

No. 19522

PLAINTIFF'S ORIGINAL PETITION—Filed November 16, 1933

To the Honorable Judge of said Court:

Now comes the City of Texarkana, Texas, a municipal corporation, chartered and incorporated under and by virtue of the laws of the State of Texas, situated in the County and [fol. 3] State aforesaid, hereinafter called plaintiff, complaining of the Southern Cities Distributing Company, a corporation duly incorporated and doing business in the City of Texarkana, Bowie County, Texas, and owning and operating a natural gas distributing plant through a system of pipes over and under the streets and alleys of the City of Texarkana, Texas, and selling natural gas to the inhabitants of said City for household and commercial purposes, hereinafter styled defendant, and for cause of action plaintiff represents to the Court:

I

That heretofore, to-wit, on the 13th day of June, A. D., 1930, plaintiff, being then duly chartered under an Act of the Legislature and acting under said Charter through its constituted officers, duly elected qualified and empowered to act, did, on the 13th day of June, A. D., 1930, by virtue of said authority granted and exercised, passed an ordinance in writing in the form of a franchise to and with the Southern Cities Distributing Company, granting certain rights and privileges to said Company and granting and establishing certain increased rates to be charged by the defendant to the plaintiff and the resident citizens and gas consumers of the said City of Texarkana, Texas, for gas distributed by it, and sold to said consumers. A copy of said franchise and ordinance is attached to this petition, marked Exhibit "A", and made a part hereof for all purposes as if copied herein.

[fol. 4]

II

That the ordinance for said franchise provides, in part, that, "This ordinance shall become effective and be binding upon the Grantee and the City of Texarkana, Texas, upon the grantee filing with the Clerk of the City of Texarkana, Texas, its written acceptance of the terms of this ordinance within sixty days from and after the passage hereof." That thereafter on the 17th day of June, A. D. 1930, the defendant, Southern Cities Distributing Company, accepted the terms and conditions set forth in said franchise, or ordinance, by filing with said City Secretary a written acceptance, as follows:

"Southern Cities Distributing Company,
Shreveport, Louisiana

June 17, 1930.

"The Hon. Mayor and City Council of Texarkana, Texas:

"The Southern Cities Distributing Company does hereby accept the Ordinance, with its terms and provisions, finally adopted by the City Council of Texarkana, Texas, on the 13th day of June, 1930.

"In testimony thereof, witness the signature and seal of said Southern Cities Distributing Company on this, the 17th day of June, A. D., 1930.

"Southern Cities Distributing Co., (Signed) D. W.
Harris, Vice-President." (Seal.)

"Filed June 18, 1930 at 11:37 A. M. Ordinance Book 4, page #48. R. E. Floyd, Secretary."

[fol. 5]

III

The plaintiff alleges that by reason of such acceptance of the franchise heretofore plead, said defendant became bound to the said City of Texarkana, Texas, and to the Citizens thereof to carry out the terms of said franchise and ordinance and to supply gas under the rates granted and established therein. Said portion of said franchise granting such rates is contained in Section V of said ordinance.

IV

Plaintiff specially pleads Section VIII-A of said franchise and ordinance agreement, which is as follows: "In con-

sideration of the granting of this franchise, it is mutually agreed and understood by and between the parties hereto that before the City Council of said City shall apply for a reduction in rates, or before the Southern Cities Distributing Company, its successors or assigns, shall make application for an increase in rates, either party shall give to the other party one year's notice in writing of its intention to so apply for an increase or decrease in rates, and no application for increase or decrease in rates shall be acted upon or considered unless said one year's notice is first given before making such application." Plaintiff would further show to the Court that said franchise is in all things in force, and that the same has not been amended, modified or repealed, nor has any attempt been made to amend, repeal or modify [fol. 6] said franchise in any manner whatsoever; all of which facts are well-known to the defendant.

V

Plaintiff would show to the Court that the defendant, Southern Cities Distributing Company, notwithstanding the terms and conditions of the franchise above pleaded and the acceptance thereof and the fact that it has been operating thereunder and collecting the rates therein granted, the said Southern Cities Distributing Company did, on the 3rd day of November, 1933, file with the City Secretary of the City of Texarkana, Texas, an instrument in writing styled "Notice and Application of Southern Cities Distributing Company, for Change and Modification of rates to Go into Immediate Effect." A copy of said application is hereto attached, marked Exhibit "B," and made a part hereof. That notwithstanding Section VIII-A of said franchise and agreement the Southern Cities Distributing Company in its said application states as follows: "Therefore, applicant gives notice to the City Council of Texarkana, Texas, and to the Public, that on November 23rd, 1933, a new schedule of rates and charges for furnishing gas will be placed into effect in Texarkana, Texas, as follows:" (Here follows the Schedule of increased rates, set forth in Exhibit "B" to this petition, said Exhibit "B," being here referred to for details as to such proposed increased rates.)

[fol. 7]

VI

Plaintiff would further show to the Court that thereafter on the 4th day of November, 1933, the defendant filed with

the City Secretary of the City of Texarkana, Texas, an instrument in writing as follows:

"Texarkana, Texas,
November 2nd, 1933.

"To the Honorable Mayor and Members of the City Council of the City of Texarkana, Texas:

"You are hereby notified pursuant to the terms of a certain franchise, dated June 13, 1930, that the grantee therein, Southern Cities Distributing Company, will apply for an increase in rates one year after date of giving this notice.

"This notice contemplated an application for an increase in rates over such rates as have been applied for pursuant to the application of said grantee, Southern Cities Distributing Company, now pending, for an immediate increase in rates upon which Southern Cities Distributing Company is requesting and will seek prompt hearing and action.

"Southern Cities Distributing Company, By Paul
F. McBride, General Manager."

"G. D. Garrett, City Secretary, Nov. 4, 1933."

VII

Plaintiff further alleges that the defendant is threatening and attempting to raise the rates of gas to the citizens and [fol. 8] gas consumers of Texarkana, Texas, in violation of said ordinance and in violation of the law and to collect from the consumers of gas in said City at a greater rate than that provided for in said franchise and ordinance; and that said rates so threatened and attempted to be put in force are in conflict with said franchise and ordinance and, if placed in effect, will work irreparable injury upon the citizens and gas consumers of Texarkana, Texas.

VIII

Plaintiff further says that it has no adequate remedy at law, and that unless restrained the Southern Cities Distributing Company will put into effect without authority of law rate far in excess of that provided for in said franchise and ordinance, and in excess of the rates which were agreed

to by the defendant in the acceptance of said franchise and ordinance.

IX

Plaintiff further says that if said rates should be put into effect, or if defendant be permitted to charge and collect the amount set forth in said Exhibit "B," it would work irreparable injury upon the citizens and gas consumers of Texarkana, Texas, in the sum of the excess of the rate attempted to be charged and collected over and above that provided for in said franchise and ordinance.

Wherefore, premises considered plaintiff prays the Court to grant its most gracious writ of injunction restraining the [fol. 9] defendant from putting into effect on the 23rd day of November, 1933, or at any other time or in any other manner except at the time and in the manner provided in said franchise and ordinance and after pursuing the remedies provided by law, the schedule of rates set out in said Exhibit "B," or from in any way attempting to put into effect any rate or schedule not in conformity with the terms and conditions of said franchise and ordinance, made a part of this petition. If, for any reason, your plaintiff is not entitled to an injunction to secure specific performance of said franchise agreement, as herein plead and prayed for, then plaintiff further pleads that the expressed intention of the defendant to put the proposed new rates into effect on November 23, 1933, will be, if carried out, in open disregard of the statutes of Texas providing a machinery for securing an increase in rates and plaintiff is entitled to such injunction to prevent the defendant from increasing its rates in any manner other than that provided by law. Plaintiff further prays for costs of suit and general relief.

Ed B. Levee, Jr., Attorney for Plaintiff. E. Newt Spivey, J. Fred Hoffman, Of Counsel.

Duly sworn to by Ed B. Levee, Jr. Jurat omitted in printing.

[fol. 10] EXHIBIT "A" TO PETITION

An Ordinance providing for a supply of gas service to and for the City of Texarkana, Texas, and its inhabitants and other consumers therein, to be furnished and supplied by Southern Cities Distributing Company, its successors and assigns, providing the rates to be charged for such service and the terms and conditions upon which such service is to be furnished and empowering said company to maintain and operate gas plants and distribution systems within the City of Texarkana, Texas, and the vicinities adjacent thereto.

Be it ordained by the City Council of the City of Texarkana, Texas, as follows:

Section I. That there is hereby granted to and vested in Southern Cities Distributing Company, a corporation, its successors and assigns (hereinafter referred to as the "Grantee"), for a period of twenty-five (25) years from the [fol. 11] date of the passage of this Ordinance, the right and franchise, power, privilege and authority to furnish, supply and serve to and within the City of Texarkana, Texas, and the vicinities adjacent thereto and to its inhabitants and other consumers therein, natural and/or manufactured and/or mixed gas; the right to construct, maintain and operate in the City of Texarkana, Texas, a plant or plants and a distribution system for the manufacture, production, purchase, sale and distribution of manufactured and/or natural and/or mixed gas; the right, franchise and privilege of using, and the right-of-way in, through, under, upon and over the present and future streets, avenues, lanes, alleys, sidewalks, bridges and approaches thereto, public highways and other public places within the City limits of the City of Texarkana, Texas, as now or hereafter fixed for the purpose of laying, installing, constructing, maintaining, operating, repairing, replacing, reclaiming, removing, and the right and privilege so to do, of all pipes, services, conduits, mains and all other material, equipment, appliances, attachments and apparatus necessary, expedient, convenient, incident or useful to the acquisition, receipt, purchase, manufacture, production, retention, sale, transportation, conveyance and distribution of natural and/or manufactured and/or mixed gas and the furnishing and supplying thereof, and the sale of gas service to the City of Texar-

kana, Texas, and inhabitants thereof and other consumers [fol. 12] therein, and the distribution of such gas to the vicinities adjacent to the said City.

Section II. The Grantee shall, with all reasonable diligence, replace all public places disturbed by it in as good condition as they were prior to the excavation thereof, and it shall at all times indemnify and save the City of Texarkana, Texas, harmless from any and all damages which the said City may suffer or be made or become liable for by reason of the laying, installing, constructing, maintaining, repairing, replacing, extending, continuing and operating said pipes, mains, services and attachments. The Grantee shall furnish to the City a properly executed and approved surety bond in the sum of one thousand (\$1,000.00) dollars for the purpose of protecting and indemnifying the City against the expense of making repairs to streets, alleys, sidewalks and pavements disturbed by Grantee's operations.

Section III. The Grantee shall, at its own expense lay and maintain all service pipes from its mains in the streets to the established curb lines of said streets. All pipes, connections and appliances from the end of the said service line shall be installed and maintained by the consumer at his sole risk and expense. All consumers shall be solely responsible for proper installation and maintenance in safe condition of all pipes, connections and appliances from the point where the consumers' pipes connect with the Grantee's service pipes. Grantee shall install and maintain suitable meters as its own expense.

[fol. 13] Section IV. The Grantee agrees to furnish gas service as herein provided, subject to interruptions caused by acts of God, the elements, strikes, lockouts, or other industrial disturbances, acts of the public enemy, wars, insurrections riots, epidemics, land slides, lightning, earthquakes, fires, storms, floods, washouts, civil disturbances, explosions, breakage or accident to machinery and freezing of lines or pipes or appliances, and in the event of the happening of any or either of said contingencies, applicant agrees to restore service immediately, and as soon as it can possibly be done.

Section V. A hearing as to the rates which shall be charged by the Grantee having been had, and the Grantee having waived any right to notice of the fixing of such rates,

the rates to be charged by the Grantee for natural gas furnished under the provisions of this ordinance are hereby determined and fixed by compromise agreement, said rates are as follows, to-wit:

Domestic and Commercial Rate

(a) For the first one thousand (1000) cubic feet per meter of gas or fraction thereof sold to any domestic or commercial consumer during any one month—\$1.00 per thousand cubic feet. Said charge shall also be made regardless of whether any gas is consumed or not.

(b) For the next one hundred and forty-nine thousand (149,000) cubic feet of gas or fraction thereof sold to any [fol. 14] domestic or commercial consumer during any one calendar month—\$.50 per thousand cubic feet. All gas sold at \$.50 per thousand cubic feet is subject to 5% discount if paid within ten (10) days after bill is rendered.

(c) For all gas sold to any one domestic or commercial consumer during any one calendar month in excess of one hundred and fifty thousand (150,000) cubic feet—\$.25 per thousand cubic feet. All gas sold at \$.25 per thousand cubic feet is subject to \$.02 per thousand cubic feet discount if paid within ten days after bill is rendered.

A charge of \$1.00 shall be made for each connect or disconnect, after first installation, that is made for the same consumer, at the same address, except where meter is removed to be replaced, repaired or for inspection.

Churches, schools or colleges maintained by State, County or City; schools or colleges maintained by any religious organizations; public hospital shall be allowed a gross discount of 40% from the gross rate for domestic and commercial gas when bills are paid within ten days after being rendered. Municipal buildings shall be allowed free gas for all gas used in conducting the City's business.

[fol. 15]

Industrial Rate

All industrial consumers shall be served by contract, the rates for the first three million, five hundred thousand (3,500,000) cubic feet shall be as follows:

(a) First 500 M cubic feet or fraction thereof sold in any one calendar month to one industrial consumer—\$.21 per M cubic feet.

(b) Next 1,000 M cubic feet or fraction thereof sold in any one calendar month to one industrial consumer—\$.20 per M cubic feet.

(c) Next 1,000 M cubic feet or fraction thereof sold in any one calendar month to one industrial consumer—\$.19 per M cubic feet.

(d) Next 1,000 M cubic feet or fraction thereof sold in any one calendar month to one industrial consumer—\$.18 per M cubic feet.

Each industrial consumer using over 3,500 M cubic feet per month shall be subject to be served under a special contract executed between the Grantee and the consumer at rates to be mutually agreed on by them provided, however, that in no case shall there be any discrimination in rates between industrial consumers so served while they are engaged in the same character of business and using substantially the same quantities of gas under substantially the same load factors, and a copy of such private contracts shall be subject to inspection of the Mayor or any member of the City Council at any time.

[fol. 16] A minimum charge of \$35.00 per month per consumer shall be collected from those consumers to whom the industrial rates apply.

A penalty of 5% shall be added if bills are not paid within ten days after said bills are rendered.

Section VI. The grantee shall have the right to require its consumers to deposit with it such sums of money as it may consider reasonably necessary to insure the prompt payment of its rates and charges. In no case shall the deposit be greater per consumer than twice the average monthly bill and in no event less than five (\$5.00) dollars per consumer, and any consumer feeling himself aggrieved by reason of the terms of this Section after a failure to agree with the Grantee herein, may appeal to the City Council for relief.

Section VII. The Grantee shall have the right to shut off gas from any consumer at any time for any of the following reasons:

For repairs, for non-payment of bills when due, for fraudulent representation in relation to the consumption of gas, for failure to make deposits when required, for

tampering or permitting the tampering with the meters or service pipes through which gas is served, for placing or permitting the placing of any substance as an obstruction in any meter or service pipe, for permitting service pipes, connections or appliances of the consumers to leak or other-[fol. 17] wise permit the escape or waste of gas. The Grantee shall have full right and authority to make and establish, from time to time, rules and regulations with reference to gas service within said City, subject to approval of City Council and prescribe the forms of applications and contracts to be signed by its customers and the Council upon consideration thereof, and if approved by it, will pass the necessary ordinances to properly enforce such rules and regulations.

Section VIII. All rights and privileges hereby granted, and all duties hereby imposed upon the Grantee shall extend to and be binding upon its successors and assigns. This Ordinance shall not impair or affect any other rights and privileges which the Grantee has heretofore acquired.

This franchise is for the sole use and benefit of the Southern Cities Distributing Company, and is not assignable or transferably to any other person, firm or corporation, without the consent of the City Council given in like manner as the granting of this franchise, and any transfer, or attempt to transfer this franchise without the consent of the City Council as herein provided shall ipso facto forfeit this franchise.

Section VIII-A. In consideration of the granting of this franchise, it is mutually agreed and understood by and between the parties hereto that before the City Council of said City shall apply for a reduction in rates, or before the Southern Cities Distributing Company, its successors or [fol. 18] assigns, shall make application for an increase in rates, either party shall give to the other party one year's notice in writing of its intention to so apply for an increase or decrease in rates, and no application for increase or decrease in rates shall be acted upon or considered unless said one year's notice is first given before making such application.

Section IX. If Grantee shall be finally compelled to, or should voluntarily, place in any rates in the City of Tex-

arkana, Arkansas, less than the rates granted by this Ordinance then and thereupon the lessened rate shall apply in the City of Texarkana, Texas, and Grantee shall not be authorized or permitted to charge and collect any higher rate.

Section X. This Ordinance shall become effective and be binding upon the Grantee and the City of Texarkana, Texas, upon the Grantee filing with the Clerk of the City of Tex-

arkana, Texas, its written acceptance of the terms of this Ordinance within sixty (60) days from and after the date of the passage hereof.

Passed and approved, this 13th day of June, 1930.

(Signed) L. S. Kennedy, Mayor.

Attest: (Signed) R. E. Floyd, City Secretary. (Seal, City of Texarkana, Texas.)

[fol. 19]

Copy

Southern Cities Distributing Company,

Shreveport, Louisiana

June 17, 1930.

The Hon. Mayor and City Council of Texarkana, Texas:

The Southern Cities Distributing Company does hereby accept the Ordinance, with its terms and provisions, finally adopted by the City Council of Texarkana, Texas, on the 13th day of June, 1930.

In testimony thereof, witness the signature and seal of said Southern Cities Distributing Company on this, the 17th day of June, A. D., 1930.

Southern Cities Distributing Co., (Signed) D. W. Harris, Vice President. (Seal, Southern Cities Distributing Company.) (Seal, City of Texarkana, Texas.)

Filed June 18th, 1930, 11:37 a. m. Ordinance Book 4, page 48. R. E. Floyd, Secretary.

EXHIBIT "B" TO PETITION

To the Honorable City Council of Texarkana, Texas, and to the Public:

Notice and application of Southern Cities Distributing Company, for change and for modification of rates and application for new rates to go into immediate effect.

Owing to the fact that gas is now and has been distributed and sold by application to consumers in the City of Tex-[fol. 20] arkana, Texas, at rates which have failed and will in the future fail to yield sufficient revenue to pay operating expenses and are and will be insufficient to provide in addition to operating expenses, for depreciation or return on investment, or both, it is necessary that the rates be changed and modified.

Applicant states that the rates heretofore charged have been and are now confiscatory of its property; and that the rates heretofore charged will not at any time in the future yield any return upon its investment in said city.

Therefore, applicant gives notice to the City Council of Texarkana, Texas, and to the Public that on November 23rd, 1933, a new schedule of rates and charges for furnishing gas will be placed into effect in Texarkana, Texas, as follows, to-wit:

Domestic and Commercial Rates

For the first 1,000 cubic feet or fraction thereof sold in any one thirty day period to any domestic or commercial consumer \$1.75.

For the next 2,000 cubic feet sold in any one thirty day period to any domestic or commercial consumer .75 per thousand cubic feet.

For the next 7,000 cubic feet sold in any one thirty day period to any domestic or commercial consumer \$.55 per thousand cubic feet.

For all gas over 10,000 cubic feet sold in any one thirty day period to any domestic or commercial consumer \$.35 per thousand cubic feet.

[fol. 21] A minimum charge of \$1.75 for each thirty day period shall be made to each domestic and commercial consumer connected to the distributing system.

An additional ten per cent over the above rates shall be charged each domestic and commercial consumer who fails to pay his bill within ten days after said bill is rendered.

Schools or colleges maintained by State, county or City; schools or colleges maintained by any religious organization; churches, public hospitals and municipal buildings shall be allowed a discount of 25% from the above rates for domestic and commercial gas when bills are paid within ten days after being rendered.

Central Heating Rates

Domestic and Commercial consumers with central heating installations shall be served under the regular domestic and commercial rates for the first 200,000 cubic feet consumed in any one calendar month; Consumption in excess of 200,000 cubic feet in any one calendar month shall be subject to be sold under special contract executed between the company and the consumer at rates to be mutually agreed upon, provided, however, that in no case shall there be any discrimination in rates between consumers so served while they are engaged in the same character of business and use substantially the same quantities of gas under approximately the same load factors.

An additional ten per cent over the above rates shall be charged each domestic and commercial consumer who fails [fol. 22] to pay his bill within ten days after said bill is rendered.

Industrial Rates

Each industrial consumer shall be subject to be served under special contract executed between the company and the consumer at rates to be mutually agreed upon, provided, however, that in no case shall there be any discrimination in rates between consumers so served while they are engaged in the same character of business and use substantially the same quantities of gas under approximately the same load factors.

A minimum charge of \$25.00 per consumer per month shall be collected from those consumers to whom the industrial rates apply.

An additional five per cent over the above rates shall be charged each industrial consumer who fails to pay his bill within ten days after said bill is rendered.

Losses on Rates in Force Since June, 1930

Applicant states that its distributing plant in the City of Texarkana, Texas has a fair value in excess of \$515,-

000.00; that its operations for the year ending December 31, 1932, after including reasonable depreciation upon the value of its physical property, resulted in a net loss in excess of \$85,000.00; that it is entitled to a minimum of eight per cent interest upon the fair value of its property plus Federal income taxes upon same; that the addition of these items increase its loss during this period to an amount in excess of \$130,000.00; that applicant is, therefore, under the necessity of increasing its gross revenue by \$130,000.00 to enable it to realize its expenses, depreciation, interest on investment and Federal income taxes on same.

Applicant further states that it is now and has been suffering an annual loss, as enumerated above in excess of \$130,000.00, and that it is now and has been suffering a daily loss in excess of \$350.00.

Applicant further states that the above computations include gross revenue on the basis of rates in effect since June 24th, 1930.

Applicant further states that the new schedule herein contained will yield a gross revenue of approximately \$309,000.00, estimated upon the basis of gas consumption the same as that actually experienced for the year 1932, and that such consumption cannot be reasonably expected to increase so as to yield petitioner under the said schedule more than an adequate or reasonable return upon its investment in the City of Texarkana, Texas, and applicant is prepared to present evidence to this effect.

Applicant states that it buys all of the gas it distributes in Texarkana, Texas from the Arkansas Louisiana Pipeline Company at the town border; that it pays a reasonable price for said gas; that the Arkansas Louisiana Pipeline Company is the owner and operator of a gas pipeline transmission system; that said system is interstate and not intrastate.

The relation between applicant and Arkansas Louisiana Pipeline Company is that the common stock of both is [fol. 24] owned by Arkansas Natural Gas Corporation with the exception of a few shares.

The Arkansas Louisiana Pipeline Company, although economically and efficiently managed, has not been able to earn a reasonable return upon the fair value of its investment, used and useful, in producing, transporting, buying and selling gas; if it should be compelled to sell gas to

applicant at less than the present price, its property would be confiscated without due process of law and it would be denied equal protection of the laws in violation of the Fourteenth Amendment of the constitution of the United States.

The fair value of the pipeline system based on prices prevailing January 1, 1932, is \$36,616,007.84. The prices on January 1, 1932 were lower than they had been for several years prior thereto and were lower than prices are now or which may be expected. Said Arkansas Louisiana Pipeline Company is now entitled to use a large valuation as the fair value of its property upon which to base returns owing to the recent rise in costs.

The revenues and expenses of the pipeline system for the twelve months period ending June 30th, 1932 were as follows:

Gross Earnings	\$5,957,804.16
Total Expense—Including depreciation on physical property at a rate of 5% per an- num	4,878,034.16

Net amount available for Federal taxes
and interest and profit on investment \$1,079,770.00

[fol. 25] From this should be deducted Federal taxes at 13 $\frac{3}{4}$ %, amounting to \$148,468.38, leaving an amount of \$931,301.62 for interest and profit on its investment, the present value of which is not less than \$36,616,007.84; that is a return of only 2.54% on the fair value of its investment as of January 1, 1932, and a less return on the present fair value thereof. For several years past, the pipeline system has failed to earn a reasonable return on its investment, and will for several years in the future fail to earn the return to which it is entitled.

Applicant further states that unless the new schedule of rates is placed into effect immediately, its investment will be seriously impaired and daily loss will continue.

Daily Confiscation

Applicant further states that it is suffering a loss of \$350.00 per day and that it is daily failing to receive sufficient revenue in the operation of its plant in the City of Texarkana, Texas, to pay operating expenses; that such losses amount to confiscation of its property. On account

of such daily confiscation, applicant prays for immediate authority to place into effect and collect the rates specified in the new schedule of rates hereinabove set forth, pending hearing; and your applicant prays that it be allowed to introduce its evidence at once, in order that the rates herein applied for may be temporarily placed into effect immediately; and that final hearing be had and completed promptly [fol. 26] and that its application be finally approved as of the date on which the new rates were temporarily placed into effect.

Applicant offers to give good and sufficient bond, for such reasonable amount and on such reasonable terms as the Council may prescribe, to refund any charges over what may be finally fixed by the City Council of Texarkana, Texas; provided that, if recourse is had by applicant to the Texas Railroad Commission or to Court, then the refund, if any, to be such only as may be adjudged by the Court.

Wherefore, premises considered, your applicant prays that said new schedule of rates and charges in the City of Texarkana, Texas, be temporarily placed into effect at once upon reasonable bond pending final hearing, and that upon final hearing the said schedule of rates be finally approved and established by the City Council.

Respectfully submitted, Southern Cities Distributing Company, by Paul F. McBride, General Manager.
(Seal of City.)

Filed 11/3/33. G. D. Garrett, City Secty., by Helen Bounds, Deputy.

[File endorsement omitted.]

[fol. 27] IN DISTRICT COURT OF BOWIE COUNTY

ORDER THAT CLERK ISSUE WRIT OF INJUNCTION—November 16, 1933

The foregoing petition for injunction being considered, it is ordered that the Clerk of the District Court of Bowie County, Texas, issue a writ of injunction in all things as prayed for in the within petition.

R. H. Harvey, Judge of District Court, Bowie County, Texas.

[File endorsement omitted.]

IN DISTRICT COURT OF BOWIE COUNTY

WRIT OF INJUNCTION—Issued November 16th, 1933, Filed
November 23rd, 1933

The State of Texas, To Southern Cities Distributing Company, a Corporation, Greeting:

Whereas, The City of Texarkana, Texas, a municipal corporation filed its petition in the District Court of Bowie [fol. 28] County, Texas, 5th Judicial Dist., on the 16th day of November, A. D. 1933, in a suit numbered 19522 on the Docket of said Court, wherein The City of Texarkana, Texas, a municipal corporation is Plaintiff vs. Southern Cities Distributing Company, a corporation is defendant alleging

(Here follows copy of Plaintiff's Original Petition as above.)

And whereas, the Hon. R. H. Harvey, Judge of said Court, has made upon said petition his fiat as follows:

THE STATE OF TEXAS,
County of Bowie:

In Session, this 16th day of November, A. D. 1933

The foregoing petition for injunction being considered, it is ordered that the Clerk of the District Court of Bowie County, Texas, issue a writ of injunction in all things as prayed for in the within petition.

R. H. Harvey, Judge of District Court, Bowie County,
Texas.

And whereas the said — — has executed and filed with the Clerk of said Court a bond in the sum of — Dollars, made payable and conditioned as required by law and the fiat of the judge.

You are hereby commanded to desist and refrain from putting into effect on the 23rd day of November, 1933, or at any other time, or in any other manner except at the [fol. 29] time and in the manner provided in said franchise and ordinance and after pursuing the remedies provided by law and the schedule of rates set out in said Exhibit "B" of plaintiff's Original Petition, or from in any way

attempting to put into effect any rate or schedule not in conformity with the terms and conditions of said franchise and ordinance plead in the Plaintiff's Original Petition until the further order of said District Court, to be holden within and for the County of Bowie, at the Court House thereof, in Boston, Texas Instanter, when and where this Writ is returnable.

Witness, D. B. Simmons, Clerk, District Court, Bowie County.

Given under my hand and the seal of said Court, at office, in Boston, Texas, this 16th day of November, A. D. 1933.

D. B. Simmons, Clerk, District Court, Bowie County, Texas.

Sheriff's Return

Came to hand on the 17 day of November, A. D. 1933, at 4 o'clock P. M., and executed on the 18 day of November, A. D. 1933, at 10 o'clock A. M., by delivering to the within named Southern Cities Distributing Company, a corporation, a true copy of this Writ, at Texarkana, Texas, by de-[fol. 30] livering a true copy of this writ to Paul E. Clay, Manager of Southern Cities Distributing Company.

G. H. Brooks, Sheriff, Bowie County, Texas, by Harry Monsarrat, Deputy.

[File endorsement omitted.]

CITATION ISSUED NOVEMBER 16, 1933, SERVED NOVEMBER 18, 1933

Do not copy Citation, state: "Citation issued November 16, 1933, served November 18, 1933, and filed November 23, 1933."

NOTICE OF PETITION AND BOND FOR REMOVAL TO FEDERAL COURT

Do not copy Notice, state: "Notice of Petition and Bond for Removal to the Federal Court dated November 21, 1933, was acknowledged by Plaintiff November 22, 1933."

[fol. 31] IN DISTRICT COURT OF BOWIE COUNTY, TEXAS, FIFTH
JUDICIAL DISTRICT

No. 19522

THE CITY OF TEXARKANA, TEXAS, Plaintiff,

VS.

SOUTHERN CITIES DISTRIBUTING COMPANY, Defendant

PETITION FOR REMOVAL—Filed November 22nd, 1933

To the Honorable Judge of said Court:

Now comes the defendant herein, Southern Cities Distributing Company, as petitioner in the above entitled cause and respectfully shows to this Court:

1

That the above numbered and entitled suit has been brought in this Court and is now pending herein.

2

That said action is of a civil nature, instituted by the City of Texarkana, Texas as a municipal corporation by a bill for injunction to restrain the defendant, Southern Cities Distributing Company, a public utility furnishing said City and the residents thereof with natural gas for fuel purposes, from raising the price of rates at which it will furnish gas to said City and its residents, all as more fully shown and set forth in plaintiff's petition and prayer for injunction filed herein on the 16th day of November, A. D., 1933, and to which reference is made for particulars.

[fol. 32]

3

That the value of the matter in controversy in said action exceeds three thousand dollars (\$3,000.00), exclusive of interest and costs, as shown by the allegation contained in the plaintiff's petition and prayer for injunction through Exhibit B attached thereto and made a part thereof, wherein it appears that defendant has been suffering a net loss annually in excess of eighty-five thousand dollars (\$85,000.00), and figuring return upon the investment plus federal taxes,

a net loss of one hundred thirty thousand dollars (\$130,000.00), and wherein the defendant states that it is under the necessity of increasing its gross revenue by one hundred thirty thousand dollars (\$130,000.00) annually to enable it to realize its expenses, depreciation, interest on investment and federal taxes.

4

That the above entitled action involves a controversy which is wholly between citizens of different states, in that the City of Texarkana, the plaintiff, is a municipal corporation and a body politic, incorporated under the laws of the State of Texas, and was at the time of the commencement of this suit in this Court, and still is, a citizen of the State of Texas and a resident of the County of Bowie in the Eastern Federal District of the State of Texas, Texarkana Division; and that your petitioner, defendant herein, is a private corporation incorporated under the laws of the State of Delaware, with its principal office in said State, [fol. 33] and was at the time of the commencement of said suit, and still is, a citizen and resident of the State of Delaware, residing at Wilmington, Delaware in said State where it has its principal office, and not a citizen or resident of the State of Texas.

5

That the time within which your petitioner, defendant herein, is required by the laws of this State and the rules of this Court to answer or plead to the declaration or petition in the above entitled action has not yet expired.

6

Your petitioner, defendant herein, presents herewith a bond with good and sufficient surety, conditioned that it will enter into the District Court of the United States for the Eastern District of Texas, Texarkana Division, within thirty days from the date of the filing of this petition, a certified copy of the record in this suit, and that it will pay all costs that may be awarded by said District Court in case the said Court shall hold that this suit was wrongfully or improperly removed thereto.

Wherefore, your petitioner prays that this Court proceed no further herein, except to accept said surety and bond,

and by order cause the record herein to be removed into said District Court of the United States within and for the [fol. 34] Eastern District of Texas, Texarkana Division of said Court of the State of Texas, according to the statute in such cases made and provided.

Southern Cities Distributing Company, Petitioners,
by H. C. Walker, W. H. Arnold, Arnold & Arnold,
King, Mahaffey, Wheeler & Bryson, Its Attorneys.

Duly sworn to by Jno. J. King. Jurat omitted in printing.

[fol. 35] Bond on removal for \$500.00, approved November 24, 1933, omitted in printing.

[fol. 36] IN THE DISTRICT COURT OF BOWIE COUNTY

[Title omitted]

ORDER OF REMOVAL

On this the 24th day of November, A. D., 1933, came on to be heard the petition of the defendant, Southern Cities Distributing Company, for the removal of this cause from this Court to the District Court of the United States for the Eastern District of Texas, Texarkana Division, which petition, together with the bond for removal, together with the original of the notice of the filing of same with the waiver of the attorney for the plaintiff endorsed thereon, was heretofore filed in this cause, and said defendant appearing by its Attorneys, presented said petition and bond, and thereupon the Court considering same finds that said petition is in due form and presents a cause for the removal prayed for, and that said bond is sufficient both in form and as to the surety, and it thus appearing that the prayer for removal should be granted:

It is, therefore, ordered, adjudged and decreed by the Court that the said bond for removal be and the same is hereby approved, and that said petition be granted, and said cause removed as prayed for, and the Clerk is directed to prepare a transcript of all the proceedings in this Court for the removal of said cause.

[File endorsement omitted.]

[fol. 37] TRANSCRIPT OF RECORD OF BOWIE DISTRICT COURT
WAS FILED IN U. S. DISTRICT COURT, ETC.

Transcript was filed in the District Court of the United States for the Eastern District of Texas, Texarkana Division on December 20, 1933.

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT
OF TEXAS, TEXARKANA DIVISION

No. —

THE CITY OF TEXARKANA, TEXAS, Plaintiff,

VS.

SOUTHERN CITIES DISTRIBUTING COMPANY, Defendant

DEFENDANT'S ANSWER AND CROSS-ACTION—Filed December
20, 1933

To the Honorable Judge of said Court:

1

Now comes the defendant, Southern Cities Distributing Company, and in answer to the petition of plaintiff, denies each and all of the allegations in plaintiff's petition contained, except as hereinafter expressly admitted.

2

Defendant admits that it is attempting to raise the rates of gas to its consumers in Texarkana, Texas, as stated in its application marked Exhibit B to plaintiff's petition. [fol. 38] Defendant states that such attempt on its part is not in violation of the law.

3

Defendant denies that it is attempting to put into effect said rates without pursuing the remedies provided by law, and in open disregard of the laws of Texas providing a machinery for securing an increase in rates.

4

Defendant states that Section VIII-A of the franchise ordinance referred to in plaintiff's petition is invalid in that it attempts to make binding provisions as to rates, which shall suspend the governmental power of the council which is subject to exertion at any time. Said governmental power of regulation of rates cannot be suspended for any definite and certain period, but the rates fixed are subject to change at any time thereafter, either upon the initiation of the City, or upon the application of the company. The said Section VIII-A of said franchise is not binding on the defendant for want of mutuality, and for the reason that it is unilateral, and for the further reason that the City lacks the power to make any binding agreement which shall hold in abeyance the governmental power over rates.

5

It is true as alleged that defendant did on November 3, 1933 file an instrument in writing styled "Notice and Application of Southern Cities Distributing Company for Change and Modification of Rates, and Application for New Rates to Go Into Immediate Effect;" said Southern Cities Distributing Company also filed on the 7th day of November, 1933 its "Motion for Prompt Hearing and Action" on account of daily confiscation, and also filed affidavits as exhibits thereto. The Council thereafter met on the 13th day of November, 1933, and brought up the said application and motion, and refused to give the defendant a preliminary hearing, and refused to give it any sort of hearing, but passed a resolution or ordinance dated November 13, 1933, prohibiting the Southern Cities Distributing Company from putting into effect the rates specified in its application.

6

Defendant here reiterates the allegations contained in its said application and in its said motion and affidavits, and makes them a part hereof by reference without repeating them at this point.

7

Defendant, therefore, states that it has done all it could to get temporary relief pending final hearing before the

City Council of Texarkana, Texas, and that it has not succeeded in getting any relief whatever, although it has continued to and continues to and will still continue to suffer daily losses amounting to confiscation, and will have no [fol. 40] remedy for what it shall have lost before the state legislative procedure is finished.

8

Defendant states that its attempt to secure relief is not in violation of any valid provision of its franchise ordinance, and is not in violation of the laws of the State of Texas, and denies that the putting into effect of said rates will work irreparable injury upon the gas consumers in Texarkana, Texas.

9

Now comes the defendant, Southern Cities Distributing Company, and by way of affirmative defense and counterclaim and cross bill against the plaintiff, City of Texarkana, Texas, alleges as follows:

10

Defendant states that to protect its property from confiscation, it is attempting to raise the rates of gas to its consumers in Texarkana, Texas, as stated in its application marked Exhibit B to plaintiff's petition. Defendant states that such attempt on its part is not in violation of the law.

11

Defendant states that Section VIII-A of the franchise ordinance referred to in plaintiff's petition is invalid in that it attempts to make binding provisions as to rates, which shall suspend the governmental power of the Council [fol. 41] which is subject to exertion at any time. Said governmental power of regulation of rates cannot be suspended for any definite and certain period, but the rates fixed are subject to change at any time thereafter, either upon the initiation of the City or upon the application of the company. Said Section VIII-A of said franchise is not binding on the defendant for want of mutuality, and for the reason that it is unilateral, and for the further reason that the City lacks the power to make any binding agree-

ment which shall hold in abeyance the governmental power over rates.

12

Defendant, on November 3, 1933, filed an instrument in writing styled "Notice and Application of Southern Cities Distributing Company for Change and Modification of Rates, and Application for New Rates to Go into Immediate Effect;" said Southern Cities Distributing Company also filed on the 7th day of November, 1933, its "Motion for Prompt Hearing and Action" by the Council on account of daily confiscation, and also filed affidavits as exhibits thereto. The Council thereafter met on the 13th day of November, 1933, and brought up the said application and motion, and refused to give the defendant a preliminary hearing, and refused to give it any sort of hearing, but passed a resolution or ordinance dated November 13, 1933, prohibiting the Southern Cities Distributing Company from [fol. 42] putting into effect, even pending hearing, the rates specified in its application.

13

Defendant here reiterates the allegations contained in its said application and said motion and affidavits attached to plaintiff's petition, and makes them a part hereof by reference without repeating them at this point.

14

Defendant, therefore, states that it has done all it could to get temporary relief pending final hearing before the City Council of Texarkana, Texas, and that it has not succeeded in getting any relief whatever, although it has continued to and continues to and will still continue to suffer daily losses amounting to confiscation, and will have no remedy for what it shall have lost before the state legislative procedure is finished.

15

Defendant states that the City is attempting to give force and vitality to said Section VIII-A of its franchise ordinance, and that such attempts on the part of the City are in violation of the law, and that the said section should be cancelled and annulled.

Defendant states that the attempts of the City, to prevent it from charging the rates applied for, is to impose [fol. 43] upon the defendant a daily loss amounting to daily confiscation of its property; that any lower rates will fail to yield revenue sufficient to pay expenses of operation, depreciation, taxes and a reasonable return upon the fair value of its property. That the attempt of the City to enforce it to charge less rates than those applied for will deprive it of its property to its damage in a sum or value exceeding three thousand dollars (\$3,000.00), exclusive of interest and costs, without due process of law, and without equal protection of the law; that under the Fourteenth Amendment to the Constitution of the United States, no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law; and defendant does now plead and invoke said provision of the United States Constitution for protection of its property. That the attempts of the City, to keep defendant from putting into effect less rates than that applied for, are violative of these provisions of the United States Constitution, and defendant urges said constitutional provisions as a protection against said efforts of said plaintiff.

Wherefore, defendant prays that the temporary injunction be dissolved and set aside, that the petition of plaintiff be denied, and that Section VIII-A of the franchise ordinance be declared null and void, and be cancelled, and that defendant recover all costs herein incurred, and for such [fol. 44] other and further relief, general and special, in law and in equity, to which it may be entitled.

H. C. Walker & W. H. Arnold, Jr., Arnold & Arnold,
King, Mahaffey, Wheeler & Bryson, Attorneys for
Defendant, by Jno. J. King.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

In Equity. No. 106

[Title omitted]

AMENDED AND SUBSTITUTED BILL IN EQUITY—Filed January
15, 1934

Comes the plaintiff, The City of Texarkana, Texas, and first having asked and obtained leave of the Court, files the following for its amended and substituted bill in equity in this cause.

[fol. 45]

I

The City of Texarkana, Texas, is a municipal corporation organized under the laws of the State of Texas, and it originally brought this suit in the State Court, and now files its amended and substituted bill herein as the representative of and as trustee for all the consumers of natural gas in said City.

The Southern Cities Distributing Company is the holder of a franchise for the distribution of natural gas in the City of Texarkana, Texas, and owns and operates a natural gas distributing plant in said City.

On March 13, 1923, the City Council of the City of Texarkana, Texas, passed an ordinance at the request of the Southwestern Gas and Electric Company, which then owned the natural gas franchise in said City, amending said franchise and granting to said Company an increase in rates. A copy of said franchise of 1923 is hereto attached, marked Exhibit "A," made a part hereof and referred to herein as such.

Thereafter, in 1928, said Southwestern Gas and Electric Company transferred its franchise to the Southern Cities Distributing Company.

In 1930 the Southern Cities Distributing Company applied to the City Council for an increase in rates, and, after a hearing, the Council rejected this application and said Southern Cities Distributing Company then appealed to the Railroad Commission of the State of Texas, and said Railroad Commission came to Texarkana and conducted hearings on said appeal on May 28 and 29, 1930. [fol. 46] While the hearing was going on and while testimony was being taken before the Railroad Commission, and before any finding or order had been made or considered, the Southern Cities Distributing Company proposed

to the City Council a compromise of said rate controversy and said compromise was then and there agreed upon between the City Council of Texarkana, Texas, and said Southern Cities Distributing Company. Said hearing before the Railroad Commission was thereupon discontinued and no finding was made and no order was entered by said Commission in said matter.

The City Council thereafter passed an ordinance in the nature of a franchise contract setting up the terms of said compromise agreement with said Southern Cities Distributing Company. This ordinance, because of the provision of law as to publication, could not be passed at once, but it was passed and approved on June 13th, 1930, and was accepted and agreed to by said Southern Cities Distributing Company by an instrument in writing dated June 17th, 1930, and filed with the City Secretary on June 18th, 1930. A copy of this franchise agreement, together with a copy of said instrument of agreement and acceptance is hereunto attached as Exhibit "B," made a part hereof and referred to herein as such.

By reason of such acceptance, the defendant, Southern Cities Distributing Company, became bound to the City of Texarkana, Texas, and to the consumers of gas therein to carry out the terms of said franchise agreement and to [fol. 47] supply gas under the rates, terms and conditions therein granted, established and agreed to.

The plaintiff says that the Southern Cities Distributing Company accepted said franchise with all its terms and conditions and has since enjoyed the benefits thereof, and is now estopped from attacking any of the terms or conditions therein contained.

The plaintiff especially pleads Section VIII-A of said franchise and ordinance agreement, which is as follows:

"Section VIII-A. In consideration of the granting of this franchise, it is mutually agreed and understood by and between the parties hereto that before the City Council of said City shall apply for a reduction in rates, or before the Southern Cities Distributing Company, its successors or assigns, shall make application for an increase in rates, either party shall give to the other party one year's notice in writing of its intention to so apply for an increase or decrease in rates, and no application for increase or decrease in rates shall be acted upon or considered unless

said one year's notice is first given before making such application."

Said franchise agreement has not been amended, modified or repealed, nor has any attempt been made to amend, modify or repeal said agreement in any manner.

The Southern Cities Distributing Company did on the 3rd day of November, 1933, file with the City Secretary an instrument in writing styled "Notice and Application of Southern Cities Distributing Company for Change and [fol. 48] Modification of Rates to Go Into Immediate Effect." A copy of said notice is hereto attached, marked Exhibit "C," and made a part hereof.

Notwithstanding Section VIII-A of said franchise agreement the Southern Cities Distributing Company stated in its notice aforesaid that it would place the proposed increased rates into effect on November 23rd, 1933.

The plaintiff says that said notice that said increased rates would be placed into effect on November 23rd, 1933, and the attempt of said Southern Cities Distributing Company to place same in effect was not only in violation of Section VIII-A of said franchise agreement but was also in violation of the statute of the State of Texas providing a means and method by which increased rates might be obtained through hearings before an administrative tribunal endowed with the legislative power to fix rates for the future. The plaintiff does not admit that Section VIII-A of said franchise agreement is not binding upon the defendant but it alleges and insists that same is a valid and binding contract and agreement, that the defendant had the power to waive any right granted it by the Statutes of Texas to obtain increased rates upon a hearing after sixty days' notice, or upon a hearing before the Texas Railroad Commission to be held within sixty days after an appeal is filed, and that the defendant did waive this right in consideration of the increased rates granted to it by said compromise agreement and embodied in the franchise agreement of June 13th, 1930.

[fol. 49] The plaintiff says further that in the event it should be mistaken in its contention that Section VIII-A of said franchise agreement is valid and binding upon the defendant, that nevertheless the defendant had no right to place said rates into effect on November 23, 1933, or at any other time or in any other manner than is provided

by the Statutes of the State of Texas. Said statutes provide that the Southern Cities Distributing Company may apply to the City Council for a raise in rates and that the City Council must hear and determine said application within sixty days. Said statutes further provide that the Gas Company may take an appeal to the Texas Railroad Commission and that said Commission must hear and determine said appeal within sixty days. Said time limitation may be extended by an agreement between the parties, but said Southern Cities Distributing Company could not be compelled to enter into such agreement. Said statutes provide a speedy remedy for securing proper rates before administrative tribunals endowed with the legislative power to fix rates for the future. Said statutes also provide that pending the hearing before the City Council said increased rates should not be placed into effect, and in the event of an appeal, they should not be placed into effect until the appeal should be passed upon by the Railroad Commission.

The plaintiff says that the attempt of the Gas Company to place said rates into effect on twenty days' notice was in violation not only of Section VIII-A of its franchise but was also in violation of the rate-regulating statutes of the [fol. 50] State of Texas, and for these reasons the plaintiff, as the representative of and as trustee for the gas consumers in said City, filed its original petition herein in the State Court, in which it asked that the defendant be restrained from placing said rates into effect in violation of its franchise agreement and also pleaded that if for any reason it was not entitled to an injunction to secure specific performance of said franchise agreement, then that the defendant should be enjoined from increasing its rates in any manner other than that provided by law, and it was upon these facts and upon this contention that the temporary injunction was granted by the State Court.

On the 4th day of November, 1933, the defendant filed with the City Secretary of the plaintiff City, an instrument in writing as follows:

"Texarkana, Texas,
November 2nd, 1933.

"To the Honorable Mayor and Members of the City Council of the City of Texarkana, Texas:

"You are hereby notified pursuant to the terms of a certain franchise, dated June 13, 1930, that the grantee therein,

Southern Cities Distributing Company, will apply for an increase in rates one year after date of giving this notice.

"This notice contemplated an application for an increase in rates over such rates as have been applied for pursuant to the application of said grantee, Southern Cities Distributing Company, now pending, for an immediate increase in rates upon which Southern Cities Distributing Company is requesting and will seek prompt hearing and action.

"Southern Cities Distributing Company, by Paul F. McBride, General Manager."

"Filed: G. D. Garrett, City Secretary, November 4, 1933."

The plaintiff says that, upon the facts hereinbefore set out and pleaded, it is entitled to an order making perpetual the temporary injunction heretofore granted by the State Court herein, and that the defendant should be enjoined from increasing or attempting to increase its rates in violation of Section VIII-A of its franchise agreement as hereinbefore pleaded. If for any reason the Court should find the plaintiff is not entitled to an injunction to secure specific performance of said Section VIII-A, then the plaintiff says further that it is entitled to an injunction preventing the defendant from increasing or attempting to increase its rates in any manner other than that provided by the statutes of the State of Texas governing the regulation of utility rates.

II

The plaintiff says further that since its original petition was filed herein in the State Court, other matters have arisen which entitle it and entitle the gas consumers of the [fol. 52] City of Texarkana, Texas, to other and further relief in addition to that which it sought in its original petition in the State Court. These new facts give rise to an additional cause of action between the gas consumers of the City of Texarkana, Texas, and this plaintiff as their representative, and the defendant, the Southern Cities Distributing Company, which additional cause of action arose out of the same franchise agreements hereinbefore pleaded, and have reference to the rates collected by the defendant in the City of Texarkana, Texas, and are proper causes of action to be joined in this suit, and said causes of action

are such that if such gas consumers or if the plaintiff, as the representative of such gas consumers should bring a separate suit in this Court on such cause of action the same would be properly consolidated herewith for purpose of trial, and if such separate suit was brought in the state court it could be and probably would be removed to this Court and when here could be properly consolidated with this suit for purpose of trial, and all such causes can and should be conveniently disposed of together and the plaintiff here pleads and asserts and asks relief thereon so as to avoid multiplicity of actions.

The plaintiff in this section of its bill, as well as the other parts of its bill herein, is suing not only for its own benefit as a consumer of gas but is suing as the representative of and trustee for and for the use and benefit of all of the gas consumers in the City of Texarkana, Texas. These [fol. 53] consumers are very numerous, there being more than 3500 of them, and they are so numerous as to make it impracticable to bring them all before the Court. The claim of all of these gas consumers against the defendant is based upon the same facts, arise out of the same contract provisions, and said consumers as a whole constitute a class all of whom have the same rights against the defendant and as to whom, insofar as the matters herein alleged and pleaded are concerned, the defendant has the same defenses, if it has any defenses. This plaintiff is the representative of all such consumers. The statutes of the State of Texas confer upon this plaintiff as such representative the right to make franchise contracts as to the distribution of gas and the rates at which it should be distributed and also confers upon it as a representative of such consumers certain rate regulating powers and also the power to represent such consumers on any appeals taken from rate decisions made by it.

Under such powers and as the representative of such consumers, the City entered into the franchise agreement and contract with the Southwestern Gas and Electric Company dated March 13, 1923, a copy of which has been heretofore set forth as an exhibit to this bill. Said franchise of 1923 provided, in part, as follows:-

"Article E.: It is further understood between the said Southwestern Gas & Electric Company, its successors and assigns, and the City of Texarkana, Texas, that the said

[fol. 54] Southwestern Gas & Electric Company shall not at any time charge for furnishing gas either to domestic or industrial consumers in the City of Texarkana, Texas, a greater sum or charge than it at the same time charges and collects from like consumers for similar service in the City of Texarkana, Arkansas."

Thereafter, as hereinbefore set out, said franchise was transferred by said Southwestern Gas and Electric Company to the defendant in this case. The franchise agreement entered into between the City and the defendant on June 13, 1930, and accepted and agreed to by the defendant as heretofore described, a copy of which franchise and which acceptance and agreement have been heretofore made a part of this bill, contained the following provision:

"Section IX. If Grantee shall be finally compelled to, or should voluntarily, place in any rates in the City of Texarkana, Arkansas, less than the rates granted by this Ordinance, then and thereupon the lessened rate shall apply in the City of Texarkana, Texas, and Grantee shall not be authorized or permitted to charge and collect any higher rate."

The plaintiff says that said provision of said franchise of 1923 and said provision of said franchise of 1930 were accepted and agreed to by the grantees of said franchises in both cases, in consideration of the agreement on the part of the City that certain increased rates should be collected. [fol. 55] And said agreements, more especially the agreement contained in the franchise of 1930, are valid and binding contracts on the part of the defendant. Said provision is a just and proper provision to prevent discrimination against the gas consumers in the City of Texarkana, Texas. The City of Texarkana, Texas, and the City of Texarkana, Arkansas, are one community, being separated only by a state line. The natural gas distributing plant owned by the Southern Cities Distributing Company serves both cities; consumers in Texarkana, Arkansas, are served from identically the same mains as consumers in Texarkana, Texas. and all of the gas which supplies both cities is purchased at the town borders of Texarkana, Texas, from the Arkansas and Louisiana Pipe Line Company, a copy all of whose stock, except the qualifying shares of directors, is owned

by the Arkansas Natural Gas Corporation, which corporation also owns all of the stock of the Southern Cities Distributing Company, the defendant in this case. Said provision in said franchise does not waive any of the rate regulating powers conferred upon the City Council by the statutes of the State of Texas, and it is a just and proper provision to prevent discrimination against the consumers in Texarkana, Texas. Said agreement was within the corporate powers of the Southern Cities Distributing Company. Its predecessor in title made such agreement in 1923 as one of the considerations to induce the City to grant increased rates at that time without a contest or controversy in the [fol. 56] Courts. The present defendant made such agreement in 1930 as one of the considerations to induce the City to enter into a compromise agreement with it granting increased rates at a time when a controversy over such increased rates was being actually contested before the Texas Railroad Commission. Said agreement is a valid and binding agreement. The defendant proposed such agreement to the City Council and has been exercising and enjoying the privileges conferred upon it therein.

At the time said compromise agreement was made, a similar compromise agreement was entered into between the Southern Cities Distributing Company and the City of Texarkana, Arkansas, whereby the same rates agreed to in Texas were to be placed in effect in Texarkana, Arkansas. Referendum petitions against such compromise agreement were at once circulated in Texarkana, Arkansas, and given a great deal of publicity in the newspapers. These petitions were circulated and this publicity took place prior to the action of the Council on June 13, 1930, in passing said franchise ordinance. It was then contemplated by both parties that said compromise agreement in Arkansas might be upset by means of said referendum petitions, and said Section IX of said franchise agreement was designed to take care of the situation in the event said compromise agreement should be upset in Texarkana, Arkansas.

Thereafter, as a result of said referendum petitions, said compromise agreement was upset, rejected, nullified and set aside as to Texarkana, Arkansas. The constitution of [fol. 57] that State provides that any measure against which a referendum petition is filed shall remain in abeyance until the election is held. Because of litigation said referen-

dum election was not held until May 28th, 1932, at which time said compromise agreement was overwhelmingly rejected. On the same day, to-wit, May 28th, 1932, the Southern Cities Distributing Company filed a suit in the United States District Court in Arkansas to prevent referendum election from having any effect. This suit has been finally decided and on December 1, 1933, the United States District Court for the Western District of Arkansas entered its final decree in said matter, a copy of which decree is hereto attached, marked Exhibit "D" and made a part hereof.

This decree orders, among other things, the following:

1. That on and after December 1, 1933, the Southern Cities Distributing Company should supply gas to the consumers in Texarkana, Arkansas, at the old rates which were in effect prior to said compromise agreement of May, 1930, which old rates are the same as those set forth in the franchise agreement of 1923 between the City of Texarkana, Texas, and the Southwestern Gas and Electric Company, a copy of which has been heretofore made a part of the bill, and which were the same rates which were in effect in Texarkana, Texas, prior to the compromise agreement of May, 1930, as embodied in said franchise of June 13, 1920. Said [fol. 58] Southern Cities Distributing Company has complied with said order of the District Court and is now supplying gas to the consumers in the City of Texarkana, Arkansas, at said old and lower rates.

In violation of Section IX of its franchise agreement said defendant has failed and refused to put said lower rates in effect in Texarkana, Texas, and is still charging its consumers in Texarkana, Texas, at the higher rates provided for in said compromise agreement. The City Council has called upon the defendant to comply with said Section IX of its franchise agreement and to place in effect in Texarkana, Texas, the lower rates which it is now charging in Texarkana, Arkansas, and has called upon it to stop and desist from discriminating against the gas consumers of Texarkana, Texas; and said defendant has failed and refused to stop the discrimination and has failed and refused to comply with its franchise agreement and is still continuing to charge and exact from the consumers of gas in Texarkana, Texas, the higher rates provided in its franchise agreement of June, 1930, which rates are higher than those

which it is now collecting from its consumers in Texarkana, Arkansas.

2. Said decree of December 1, 1933, in the United States District Court for the Western District, also determined that the collection by the defendant of the rates provided in said compromise agreement of May, 1930, from the time when said rates were placed in effect in June, 1930, down to and including its collections up to December 1, 1933, were [fol. 59] unlawful and illegal insofar as the rates exceeded those in effect in said City prior to May, 1930, and said Court ordered said defendant to make refunds to all of its consumers in Texarkana, Arkansas, of the difference between the amounts actually collected by it under the rates provided in said compromise agreement and the amounts which it should have collected under the rates which were lawfully in effect, which rates the Court found and determined to be the rates which were in effect prior to said compromise agreement and which this plaintiff alleges to be the rates set up in the franchise of March, 1923, which has been heretofore made an Exhibit to this bill.

The plaintiff says that the consumers of gas in the City of Texarkana, Texas, are entitled to an order from this Court directing said Southern Cities Distributing Company to at once place in effect in the City of Texarkana, Texas, the rates which it is now applying in the City of Texarkana, Arkansas, and that such consumers are further entitled to an order and judgment from this Court directing the defendant to make refunds to such consumers for the excess collected by said Company from the time said increased rates were put into effect in June, 1930, down to the date of the decree herein, over and above the amount which was due to said Company under the rates provided in said franchise agreement of 1923. The plaintiff says that said decree of the United States District Court in Arkansas compelled the defendant to place in effect in Texarkana, Arkansas, as of [fol. 60] May 30th, 1930, rates less than the rates shown in the franchise agreement of June 13th, 1930, between this plaintiff and this defendant, and that said franchise agreement provides that if said defendant is compelled to place any such lower rates in effect in Texarkana, Arkansas, that the lesser rate shall apply in the City of Texarkana, Texas.

The plaintiff says further that it has received from numerous gas consumers in the City of Texarkana, Texas, assign-

ments to the plaintiff of a part of such refunds as may be due them and that such assignments were granted to the City for the purpose of paying the expenses of this litigation and for the purpose of paying the expenses of the present controversy now pending before the Council as to increased rates, and that it would be unfair and unjust to this plaintiff to permit the defendant to defeat its right to recover under such assignments by any offsets which it might claim against such refunds arising on and after the date of the filing of this amended bill.

Premises considered, the plaintiff for its own use and benefit and as the representative of and as Trustee for all the consumers of gas in the City of Texarkana, Texas, and for the use and benefit of all such consumers of gas, prays:

1. That this Court should make perpetual the injunction heretofore issued ' .he State Court and should enjoin the defendant from raising and from attempting to raise its rates in violation of Section VIII-a of its franchise agreement of June, 1930.

[fol. 61] 2. If for any reason the plaintiff and the gas consumers of the City of Texarkana, Texas, are not entitled to an injunction to secure specific performance of Section VIII-a of said franchise agreement, then the plaintiff prays that the injunction heretofore granted by the State Court be made permanent, and that the defendant be enjoined from in any manner raising or attempting to raise its rates in the City of Texarkana, Texas, in any manner or at any time other than that provided by the statutes of the State of Texas for the regulation of such gas rates.

3. That the defendant be ordered and directed to comply with Section IX of its franchise agreement and to at once place in effect in the City of Texarkana, Texas, the rates for gas which it was compelled to place in effect in the City of Texarkana, Arkansas, by said Decree of December 1st, 1933, of the United States District Court for the Western District of Arkansas.

4. That the defendant be ordered and directed to file with the Clerk of the Court and to deliver a copy to this plaintiff, a statement under oath showing all monies collected by it from its consumers in Texarkana, Texas, under the rates provided in said franchise contract of June 13, 1930, from

the time said rates were first put into effect down to and including all collections under such rates as long as they are in effect, and shall show as to each of such consumers the name and address of each consumer, the amount of gas [fol. 62] supplied each month to each consumer, the amount collected each month from each consumer under such rates and the amount which would have been due from each consumer under the rates which are now in effect in Texarkana, Arkansas, and the difference for each month between the amount so collected and the amounts which would have been due under the rates now in effect in Texarkana, Arkansas, and that the Court should order said defendant to pay into the registry of this Court at the time such statement is filed the total excess between the amount so collected and the amount so due, without any deductions for any offset, setoff or counter-claims of any kind whatsoever, plus the fees, costs and commission to which the Clerk of the Court may be entitled for paying out such monies to the persons who may be then entitled to receive the same; that the plaintiff and each of the gas consumers be afforded access to the books and records of the Company for the purpose of checking such statement, and that they may be permitted such time as may be reasonable within which to call any errors in such statement to the attention of the Court.

5. For judgment for all its costs in and about this suit expended and for all other necessary or proper relief.

Ed. B. Levee, Jr., Attorney for Plaintiff.

[fol. 63] *Duly sworn to by Ed. B. Levee, Jr. Jurat omitted in printing.*

EXHIBIT "A" TO AMENDED BILL

An ordinance amending an ordinance fixing the rates which may be charged by the Southwestern Gas & Electric Company, its successors and assigns, for furnishing natural gas in the City of Texarkana, Texas, to gas consumers of said city, entitled: "An Ordinance fixing the rates which may be charged by the Southwestern Gas & Electric Company for furnishing gas under its franchise contracts with the City of Texarkana, Texas, and amending Section I of an ordinance amending an ordinance granting to E. J. Spencer and Thos. W. Crouch a fran-

[fol. 64] chise for the manufacture, sale and distribution of gas in the City of Texarkana, Texas, passed July 2, 1902, and supplemented August 5, 1903, which amendatory ordinance was approved March 23, 1908; and amending Section IV of an ordinance amending an ordinance passed by the City of Texarkana, Texas, on December 6, 1905, granting to the Citizen's Oil & Pipe Line Company, Limited, a gas franchise, which amendatory ordinance was approved March 23, 1908," passed by the City Council of Texarkana, Texas, and approved September 4, 1918:

Section 1. Be it ordained by the City Council of Texarkana, Texas, that Section I and Section II of an ordinance passed by the City Council of Texarkana, Texas, and approved September 4, 1918, entitled "An Ordinance fixing the rates which may be charged by the Southwestern Gas & Electric Company for furnishing gas under its franchise contracts with the City of Texarkana, Texas, and amending Section 1 of an ordinance amending an ordinance granting to E. J. Spencer and Thos. W. Crouch a franchise for the manufacture, sale and distribution of gas in the City of Texarkana, Texas, passed July 2, 1902, and supplemented August 5, 1903, which amendatory ordinance was approved March 23, 1908; and amending Section IV of an ordinance amending an ordinance passed by the City of Texarkana, Texas, on December 6, 1905, granting to the Citizen's Oil & Pipe Line Company, Limited, a gas franchise, which amendatory ordinance was approved March 23, 1908," be and the same is hereby amended to read as follows:

[fol. 65] Section 1. The Southwestern Gas & Electric Company, its successors and assigns are hereby granted the right to charge as a maximum price for furnishing natural gas in the City of Texarkana, Texas, to gas consumers of said City the following rates per one thousand (1000) cubic feet:

Article A. For furnishing natural gas for domestic and commercial purposes and for lighting or illumination in any character of institution whatsoever and for all other purposes — (except for gas used in internal combustion engines and except for fuel used under boilers and in furnaces where gas is used as a fuel for strictly manufacturing purposes) — fifty cents (50¢) per one thousand (1000) cubic feet for all monthly consumption at any individual installation

ranging up to and including one hundred thousand (100,000) cubic feet, and twenty-two cents (22¢) per one thousand (1000) cubic feet for all monthly consumption at any individual installation above one hundred thousand (100,000) cubic feet, with ten per cent (10%) discount applying on monthly accounts for services rendered at any individual installation when accounts for services rendered are paid at the company's office on or before ten (10) days following date of bill.

Article B. For furnishing natural gas for use as fuel within boilers and furnaces only, for the consumption of gas as fuel for strictly manufacturing purposes, the following schedule of net rates per one thousand (1000) cubic feet [fol. 66] shall apply for monthly consumption at any individual installation:

Consumption of Gas per month in cubic feet	Net rate per one thousand (1000) cubic feet
First Five hundred thousand (500,000) cubic feet	Twenty-one cents (21¢) net
Next One Million (1,000,000) cubic feet	Twenty cents (20¢) net
Next One Million (1,000,000) cubic feet	Nineteen cents (19¢) net
Next One Million (1,000,000) cubic feet	Eighteen cents (18¢) net

and for all monthly consumption at any individual installation above three million five-hundred thousand (3,500,000) cubic feet per month seventeen cents (17¢) net per one thousand (1000) cubic feet, with the understanding that bills for monthly consumption shall be rendered at a gross rate of ten per cent (10%) higher than the foregoing net prices, which additional amount of billing will be allowed as a discount, provided bills for each month's service are paid at the company's office within ten (10) days following date of bill.

Article C. For natural gas furnished for use in internal combustion engines the rate shall be forty cents (40¢) per one thousand (1000) cubic feet for all monthly consumption at any individual installation, with ten per cent (10%) discount when bills for monthly services rendered are paid at the company's office within ten (10) days following date of bill.

[fol. 67] Article D. In the event that the consumption of gas by any consumer at any individual installation under the rates herein prescribed does not amount to a net sum of fifty cents (50¢) for any one month, then the said Southwestern Gas & Electric Company, its successors and assigns, are hereby granted the right to charge such consumer for each installation a net sum of fifty cents (50¢) for such month's service, whether there is any consumption of gas or not, said charge to be known as "a minimum charge," and to be of the same amount and nature as the charge hereinbefore prevailing in Texarkana, Texas.

Article E. It is further understood between the said Southwestern Gas & Electric Company, its successors and assigns, and the City of Texarkana, Texas, that the said Southwestern Gas & Electric Company shall not at any time charge for furnishing gas either to domestic or industrial consumers in the City of Texarkana, Texas, a greater sum or charge than it at the same time charges and collects from like consumers for similar service in the City of Texarkana, Arkansas.

Section 2. Be it further ordained that this ordinance shall take effect and be in force from and after its passage and approval as required by law.

Passed and approved this 13 day of March, A. D. 1923.

(Signed) G. W. Middleton, Mayor.

Attest: (Signed) W. H. James, City Secretary. (Seal of Corporation of Texarkana, Texas.)

[fol. 68] I, G. D. Garrett, the duly elected and qualified City Secretary of the City of Texarkana, Texas, do hereby certify that the foregoing is a true and correct copy of the franchise entered into by and between the City of Texarkana, Texas, and the Southwestern Gas & Electric Company on March 23, A. D. 1923.

G. D. Garrett, City Secretary. (Seal.)

January 15, A. D. 1934.

Item No. 9:

Exhibit "B": Ordinance of June 13, 1930 and acceptance. Do not copy, refer to Exhibit "A" of the Original Petition, Item 1.

Exhibit "C": Notice and Application of Southern Cities Distributing Company for Change and Modification of Rates. Do not copy, refer to Exhibit "B" of Plaintiff's Original Petition, Item 1.

EXHIBIT "D" TO AMENDED BILL

IN THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT
OF ARKANSAS, TEXARKANA DIVISION

In Equity. No. 203

SOUTHERN CITIES DISTRIBUTING Co., Plaintiff,

vs.

CITY OF TEXARKANA, ARKANSAS, et al., Defendants

DECREE

On this the 1st day of December, 1933, comes the City of Texarkana, Arkansas, et al., by Willis B. Smith, City Attorney, and B. E. Carter, its attorneys; and comes the Southern Cities Distributing Company by W. H. Arnold and William H. Arnold, Jr., its attorneys, and this cause is submitted to the court upon the mandate of the United States Circuit Court of Appeals for the Eighth Circuit filed herein on November 21, 1933; and upon a certified copy of an order entered by said Circuit Court of Appeals on November 21, 1933, and filed herein on November 25, 1933; and upon the motion filed by said City on November 22, 1933, for a decree on the mandate and for a decree on the cross bill; and upon the petition of the City of Texarkana, Arkansas, filed herein on October 25, 1933, setting up a claim to certain refunds by reason of alleged assignments for same; and upon the petition of B. E. Carter for attorney's fees, filed herein on October 25, 1933; and upon the motion of the Southern Cities Distributing Company, filed herein on this date to dismiss the cross bill; and upon the answer of said Southern Cities Distributing Company, filed herein on this day, to the petition of the City of Texarkana with reference to said assignments and to the petition of B. E. Carter for attorney's fees; and upon the

affidavit of Paul E. Clay, filed by said Southern Cities Distributing Company in connection with its said answer.

The court having heard said pleadings and the argument of counsel and being well and sufficiently advised as to the facts and the law finds, makes and enters the following orders and decrees:

It is by the court considered, adjudged and decreed that on and after December 1, 1933, the Southern Cities Distributing Company cease charging gas consumers connected to its Texarkana, Arkansas distributing plant for gas under rates put into effect by a resolution passed by the City Council of the City of Texarkana, Arkansas, dated May 30, 1930, which rates are as follows:

Domestic and Commercial Rates

(a) For the first one thousand (1000) cubic feet per meter of gas or fraction thereof sold to any domestic or commercial consumer during any one month—\$1.00 per thousand cubic feet. Said charge shall also be made regardless of whether any gas is consumed or not.

(b) For the next one hundred and forty-nine thousand (149,000) cubic feet of gas or fraction thereof sold to any domestic or commercial consumer during any one calendar month—\$.50 per thousand cubic feet. All gas sold at \$.50 per thousand cubic feet is subject to 5% discount if paid within ten (10) days after bill is rendered.

(c) For all gas sold to any one domestic or commercial consumer during any one calendar month in excess of one hundred and fifty thousand (150,000) cubic feet—\$.25 per thousand cubic feet. All gas sold at \$.25 per thousand feet is subject to \$.02 per thousand cubic feet discount if paid within ten days after bill is rendered.

[fol. 71] A charge of \$1.00 shall be made for each connect or disconnect, after first installation, that is made for the same consumer, at the same address, except where meter is removed to be replaced, repaired or for inspection.

Churches, schools or colleges maintained by State, County or City; schools or colleges maintained by any religious organizations; public hospitals shall be allowed a gross discount of 40% from the gross rate for domestic and commercial gas when bills are paid within ten days after being

rendered. Municipal buildings shall be allowed free gas for all gas used in conducting the City's business.

Industrial Rates

All industrial consumers shall be served by contract, the rates for the first three million, five hundred thousand (3,500,000) cubic feet shall be as follows:

(a) First 500 M cubic feet or fraction thereof sold in any one calendar month to one industrial consumer—\$.21 per M cubic feet.

(b) Next 1,000 M cubic feet or fraction thereof sold in any one calendar month to one industrial consumer—\$.20 per M cubic feet.

(c) Next 1,000 M cubic feet or fraction thereof sold in any one calendar month to one industrial consumer—\$.19 per M cubic feet.

[fol. 72] (d) Next 1,000 M cubic feet or fraction thereof sold in any one calendar month to one industrial consumer—\$.18 per M cubic feet.

Each industrial consumer using over 3,500 M cubic feet per month shall be subject to be served under a special contract executed between the Grantee and the consumer at rates to be mutually agreed on by them provided, however, that in no case shall there be any discrimination in rates between industrial consumers so served while they are engaged in the same character of business and using substantially the same quantities of gas under substantially the same load factors, and a copy of such private contracts shall be subject to inspection of the Mayor or any member of the City Council at any time.

A minimum charge of \$35.00 per month per consumer shall be collected from those consumers to whom the industrial rates apply.

A penalty of 5% shall be added if bills are not paid within ten days after said bills are rendered.

It is further decreed that on all bills against its consumers issued on and after December 1, 1933, the Southern Cities Distributing Company shall charge for gas distributed in the City of Texarkana, Arkansas, at the rates which were in

effect prior to the passage of said resolution May 30, 1930, which rates are as follows:

[fol. 73] For furnishing natural gas for domestic and commercial purposes and for lighting or illumination in any character of institution whatsoever and for all other purposes—(Except for gas used in internal combustion engines and except for fuel used under boilers and in furnaces where gas is used as fuel for strictly manufacturing purposes)—fifty cents per one thousand cubic feet for all monthly consumption at any individual installation ranging up to and including one hundred thousand cubic feet, and twenty-two cents per one thousand cubic feet for all monthly consumption at any individual installation above one hundred thousand cubic feet, with ten per cent discount applying on monthly accounts for services rendered at any individual installation when accounts for services rendered are paid at the company's office on or before ten days following date of bills.

For furnishing natural gas for use as fuel within boilers and furnaces only for the consumption of gas as fuel or strictly manufacturing purposes, the following schedule of net rates per one thousand cubic feet shall apply for monthly consumption at any individual installation:

Consumption of Gas per Month in Cubic feet	Net rate per one Thousand Cubic Feet
First—Five hundred thousand cubic feet	Twenty-one cents net
Next—One Million cubic feet	twenty cents net
Next—One Million cubic feet	nineteen cents net
Next—One Million cubic feet	eighteen cents net

[fol. 74] And for all monthly consumption at any individual installation above three million five hundred thousand cubic feet per month seventeen cents per one thousand cubic feet net, with the understanding that bills for monthly consumption shall be rendered at a gross rate of ten per cent higher than the foregoing net prices which additional amount of billing will be allowed as a discount, provided bills for each month service are paid at the company's office within ten days following date of bill.

For natural gas furnished for use in internal combustion engines the rates shall be forty cents per one thousand cubic feet for all monthly consumption at any individual installation, with ten per cent discount when bills for

monthly services rendered are paid at the company's office within ten days following date of bill.

In the event that the consumption of gas by any consumer at any individual installation under the rates herein prescribed does not amount to a net sum of fifty cents for any one month, then the said Southwestern Gas & Electric Company, its successors, and assigns, are hereby granted the right to charge such consumer for each installation a net sum of fifty cents for such month's service, whether there is any consumption of gas or not, said charge to be known as a "Minimum Charge" and to be of the same amount and nature as the charge hereinbefore prevailing in Texarkana, Arkansas, and vicinity.

If on account of non-payment of bills or violation of any rule or regulation, the said Southwestern Gas & Electric [fol. 75] Company is obliged to shut off the supply of gas of any consumer, a charge of one dollar will be made for turning same on again for such consumer so cut off, and a like charge will be made to each consumer requiring the moving of a meter oftener than once in any twelve month period, the charges under this Article being the same in amount and nature as the charges now and hereinbefore prevailing in Texarkana, Arkansas, and vicinity.

It is ordered that all bills rendered to consumers prior to December 1, 1933, and not paid as of that date and on which charges were made at the rates put into effect by said resolution of May 30, 1930, be paid by the consumers as rendered. The company is ordered to include all such bills rendered prior to December 1, 1933, in its statement and accounting to this court for refunds as hereinafter set forth.

It is further considered, ordered, adjudged and decreed by the court that the Southern Cities Distributing Company shall on or before December 15, 1933, file with the Clerk of this court, and deliver a copy to the City of Texarkana, Arkansas, a statement under oath showing all moneys collected by it from its consumers in Texarkana, Arkansas, under the rates provided in the resolution passed by the City Council of said city on May 30, 1930, from the time said rates were first put into effect down to and including all bills charged and collected against its consumers prior to December 1, 1933. Said statement to show the name and address of each consumer, the amount of gas supplied each [fol. 76] month to each consumer, the amount collected, the amount due under the rates which were applied in said city

immediately prior to May 30, 1930, and the difference between the amounts so collected and the amounts so due, and shall at the same time pay into the registry of this court the total excess between the amount so collected after said rates so provided by said resolution of May 30, 1930 were put into effect and the amount due under the rates as applied prior to May 30, 1930, plus the fees, costs and commissions to which the Clerk of this court may be entitled to receive for paying out such moneys to the persons entitled to receive the same. The City of Texarkana, Arkansas shall be afforded access to the books and records of said company for the purpose of checking such statement and may call any errors therein to the attention of this court for correction within 30 days after a copy of such notice is served upon said city.

Upon the filing of such statement and the payment of such moneys the Clerk of this court is directed to publish a notice in the Texarkana Press of Texarkana, Arkansas, once a week for two weeks, notifying all consumers of gas in said city and all persons who might have a claim to a refund on account of the collection of such rates that said statement has been filed and such moneys has been paid into court, and warning them to present within thirty days after the last publication of said notice any objections or exceptions that they or any of them may have to the amount of refunds shown to be due them on such statement, and warning them [fol. 77] upon their failure to do so said statement shall be taken as correct insofar as they are concerned.

After the time has expired within which consumers may file exceptions to the amount of refunds and after the time has expired within which the city may file exceptions to the amount of such refunds, and after this court shall have passed upon and settled any exceptions which may be filed as above provided, the Southern Cities Distributing Company and the sureties upon its bonds which have been filed in this court and in the United States Circuit Court of Appeals, shall stand discharged from any and all liability to the gas consumers of the City of Texarkana, Arkansas, and each and every one of them for its action in collecting said rates for gas set forth in said resolution of May 30, 1930, and each and every one of said consumers shall be, and they are hereby enjoined from bringing any action against said Southern Cities Distributing Company for such refunds in any other manner and any other court than as hereinabove provided and set forth. Such injunction is necessary on ac-

count of the number and character of the refunds and by reason of the fact that otherwise there would be confusion and multiplicity of suits, and the rights of any consumer cannot otherwise be properly determined; this court has ancillary jurisdiction thereof and exclusive jurisdiction, and the court further finds that there are adverse claimants and controverted questions of law and fact, common to all claimants, which will determine the right of the consumers to recover and to whom the refunds or parts thereof shall be [fol. 78] paid; all of the refunds are commonly affected by said questions.

With reference to the petition of B. E. Carter for attorney's fees, it is ordered that the Clerk of this court at once publish notice in the newspaper above described, notifying all gas consumers in said city that said petition has been filed, asking for allowance of said fees amounting to one half of each and all of the refunds which may be found due in this proceeding, and warning said persons to file with the Clerk of this court within 30 days after the last publication of said notice any objections they may have to the granting of said petition. The costs pertaining thereto shall be paid by B. E. Carter.

With reference to the petition of the City of Texarkana, Arkansas, wherein it claims that it is entitled to receive all of certain refunds by reason of assignments from the various individual consumers, it is ordered that the Clerk at once publish notice of the filing of said petition once a week for two weeks in the newspaper above named, which notice shall set out the names of all the consumers listed in the exhibit attached to the petition of the city, and shall warn the persons named thereon to file with the Clerk of this court within 30 days after the last publication of said notice any objections which they may have to this court recognizing said assignments and ordering the payment of refunds assigned thereunder to the City of Texarkana, Arkansas. [fol. 79] The costs in connection with this petition, including the cost of publication, shall be at the expense of the city.

If any refund or any part of any refund is unclaimed or denied by June 1, 1934, it shall be repaid to plaintiff, or if plaintiff is required to pay any refund or any part thereof in any other manner, the refund in this court shall be re-paid to plaintiff.

The city shall file all assignments and the plaintiff is given permission to take possession of them for the purpose of auditing and checking.

Should the Southern Cities Distributing Company desire to mail notice to each consumer showing the filing of the statement of refunds, the matter of assignments and of the claim for attorney's fees, it may do so at its own cost, and upon said company making proof, by affidavit, of the mailing of such notices, same shall be construed as personal service upon each of said consumers to whom such notice is mailed.

The decree with reference to the rates to be charged after December 1, 1933, is without prejudice to the present proceedings before the City Council or to a new suit. The original bill filed herein on May 28, 1932, is dismissed.

Southern Cities Distributing Company requests that the city on its petition for refund be required to notify or cause to be notified each assignor or his representatives, and if they cannot be personally notified that they be notified in accordance with Section 57 of the Judicial Code. The said company objects to the manner of notifying the consumers [fol. 80] of the petition of the city by publication as set out in the decree and saves exceptions to the refusal of the court to cause proper notice to be given and to the publication of the notice as specified. The basis of this objection is that the order of the court would not be binding upon the gas consumers who are claimed to have signed the assignments and who in fact did not, or which are for some other reason defective and invalid, and on the ground that it is not a class proceeding, as each assignment presents a particular controversy.

That part of the decree objected and excepted to, reads as follows:

"With reference to the petition of the City of Texarkana, Arkansas, wherein it claims that it is entitled to receive all of certain refunds by reason of assignments from the various individual consumers, it is ordered that the Clerk at once publish notice of the filing of said petition once a week for two weeks in the newspaper above named, which notice shall set out the names of all the consumers listed in the exhibit attached to the petition of the City, and shall warn the persons named thereon to file with the Clerk of this Court within 30 days after the last publication of said notice

any objections which they may have to this court recognizing said assignments and ordering the payment of refunds assigned thereunder to the City of Texarkana, Arkansas."

(Signed) Heartsill Ragon, Judge.

Filed Dec. 1, 1933. Wm. S. Wellshear, Clerk.

[fol. 81] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER TO AMENDED AND SUBSTITUTED BILL IN EQUITY, AND
AMENDED AND SUBSTITUTED ANSWER AND AMENDED AND
SUBSTITUTED CROSS BILL AND COUNTER CLAIM—Filed
March 9, 1934

To the Honorable Randolph Bryant, United States District
Judge:

Now comes the defendant, Southern Cities Distributing
Company, and in answer to the amended and substituted
bill in equity, and by way of amendment and substitution of
its original answer filed in this cause, pleads as follows:

[fol. 82]

1

Defendant denies each and all the allegations in plaintiff's
amended and substituted bill in equity, except as herein-
after expressly admitted.

2

Defendant admits that prior to the passage or the grant-
ing of the franchise dated June 13, 1930 the Council held
a hearing as to rates which should be charged by defendant,
and that upon said hearing the rates to be charged by de-
fendant for natural gas furnished under said franchise
were fixed and allowed by the Council.

3

Defendant denies that it is estopped from properly apply-
ing the laws and constitution of the State of Texas to Sec-
tions VIII-A and IX of the franchise.

4

Defendant states that Section VIII-A of said franchise is invalid in that it conflicts with and violates the laws and constitution of the State of Texas for the power of rate regulation cannot be suspended or held in abeyance. Rates cannot be contracted out must be fixed under the regulatory powers. Said section is invalid because it attempts to make binding provisions as to rates, suspending the governmental power of the Council which is subject to exertion at any time; the governmental power of regulation of rates cannot be suspended for any definite and certain period of time, [fol. 83] but the rates fixed are subject to a change at any time thereafter, either upon the initiation of the city or upon the application of the company. Said Section VIII-A is not binding upon the city, and being unilateral, cannot be binding on the defendant for want of mutuality, and for the further reason that the city lacks the power to make any binding agreement which shall hold in abeyance its governmental power over rates.

5

Defendant admits that on the 3rd day of November, 1933, it filed with the City Secretary an instrument in writing styled "Notice and Application of Southern Cities Distributing Company for Change and Modification of Rates and Application for New Rates to Go Into Immediate Effect." Defendant states that said notice was not in violation of any valid provision of the franchise referred to, nor in violation of the Statutes of the State of Texas. Defendant also states that it filed on the 7th day of November, 1933, its "Motion for Prompt Hearing and Action," on account of daily confiscation, and also filed affidavits as exhibits thereto. The Council thereafter met on the 13th day of November, 1933, and considering said application and motion, refused to give the defendant a preliminary or any other hearing, but passed a resolution or ordinance dated November 13, 1933, prohibiting defendant from putting into effect the rates specified in its application. Defendant here reiterates the [fol. 84] allegations contained in its said application and in its said motion and affidavits, and makes them a part hereof by reference without repeating them at this point. But inasmuch as the plaintiff has made the application an exhibit to its amended bill, defendant does not attach copy of the

same. Defendant, therefore, states that it did all it could to get temporary relief pending final hearing before the City Council of Texarkana, Texas, and that it did not succeed in getting any relief whatever before said Council, although it has continued, continues and will continue to suffer daily losses amounting to confiscation, and will have no remedy for what it shall have lost before the state legislative procedure is finished. The Council on January 23, 1934, passed a resolution finally denying plaintiff's application for a change in rates, and plaintiff has filed an appeal with the Railroad Commission of Texas from said order and resolution, as well as appeal from the resolution of the Council calling upon the defendant to restore the rates of 1923, and defendant has not secured any relief yet. Defendant states that its attempts and efforts to secure relief are not in violation of any valid provisions of its franchise, and are not in violation of the laws of the State of Texas, but are in conformity therewith, and yet defendant has been unable to secure relief. Defendant makes a part of its answer its counter claim and cross bill by reference as the same follow. Defendant denies that it had the power to waive or avoid its right to seek reasonable remuneration [fol. 85] for furnishing gas in Texarkana, Texas, and denies that it did do so.

6

Defendant states that it did have the right to place into effect the rates applied for on November 23, 1933, and states that it has unlawfully been prevented from doing so as this defendant set up in its said notice and application filed with the City Council that the rates being charged were confiscatory and unreasonable, and that it was being subjected to daily confiscation and loss. Defendant has exhausted its remedy before the Council without avail, and has filed an appeal to the Railroad Commission of Texas, but is still being denied the right to charge reasonable rates, and is still being forced to charge confiscatory rates in violation of the Constitution of the United States. It has exhausted all remedies open to it without relief, and states that it is entitled to charge said rates applied for on account of daily confiscation. The remedy before the state administrative tribunal is not a speedy, adequate or secure remedy in case of daily confiscation, because as plaintiff alleges the Statutes of Texas "Also provide that pending the hearing before the

City Council said increased rates should not be placed into effect, and in the event of an appeal, they should not be placed into effect until the appeal should be passed upon by the Railroad Commission."

[fol. 86]

7

Defendant denies that its attempt to secure reasonable rates was in violation of any valid provisions of its franchise, or of the valid statutes of the State of Texas, but that it was in conformity with applicable procedure so far as defendant was able to follow the same in order to secure and bring itself within the protection of the Fourteenth Amendment to the Constitution of the United States, which provides that no person shall be deprived of his property without due process of law, or be denied equal protection of the laws.

8

Defendant denies that plaintiff is entitled to secure specific performance of Section VIII-A of said franchise in the manner and form in which it is claimed, or in any other manner, as said Section VIII-A is invalid, and defendant denies that plaintiff is entitled to an order making perpetual the temporary injunction granted by the state court from which this cause is removed, or that defendant should be enjoined from prosecuting its attempt to secure reasonable rates. Defendant states that the city is likewise not entitled to an injunction, preventing defendant from increasing or attempting to increase its rates in any manner other than that provided by the statutes of the State of Texas, because defendant has pursued the course laid down by such statutes and is still not able to get relief.

[fol. 87]

9

Defendant denies that Article E of the ordinance of the Council dated March 13, 1923, referred to by plaintiff, affecting the franchise of the Southwestern Gas & Electric Company, is now in force, as the old franchise of the Southwestern Gas & Electric Company has expired according to the terms of its duration, and has been superseded by the new franchise dated June 13, 1930. Defendant denies that under any circumstances said Article E could be binding, for the same reasons as those set out in relation to Section IX of the franchise dated June 13, 1930.

10

Defendant denies that Section IX of the franchise dated June 13, 1930 is valid, because it undertakes to deprive the City Council of Texarkana, Texas, of its lawful and sole jurisdiction, and because it undertakes to delegate to authorities outside of the State of Texas the power to regulate rates within the State of Texas. In the alternative, and in the alternative only, defendant states that said section does not mean what plaintiff claims it means, even if it should be held to be valid.

11

Defendant denies that said Section IX can be upheld to prevent the alleged discrimination against the gas consumers in the City of Texarkana, Texas, because the alleged discrimination cannot apply to divest the City Council of [fol. 88] Texarkana, Texas, of its jurisdiction and place it elsewhere, and cannot be made an issue herein. Defendant denies that Section IX of said franchise does not waive any of the regulating powers conferred upon the City Council of Texarkana, Texas, by the statutes of the State of Texas, and denies that the alleged discrimination is or can become an issue herein.

12

Defendant denies that at the time the franchise of June 13, 1930, was granted, referendum petitions in Arkansas were being circulated against the resolutions of May 30, 1930 of the City Council of Texarkana, Arkansas, and denies that such referendum petitions were given a great deal of publicity in the newspapers, and denies that said petitions and said publications took place prior to the action of the Council of Texarkana, Texas, on June 13, 1930; denies that it was then contemplated by both parties that said compromise agreement in Arkansas might be upset by means of said referendum petitions; and denies that Section IX of said franchise was designed to take care of the situation in the event said resolution of May 30, 1930, should be upset in Texarkana, Arkansas; but defendant states that Section IX of said franchise, if valid, is not ambiguous. Even if it should be held valid said provisions would only relate to rates to be charged in Texarkana, Texas, after December 1, 1933, and could not, according to its terms, be retroactive.

[fol. 89] Even if the court should hold said provisions valid, and if the court should further hold that it is ambiguous, the proper construction to be given to the facts and circumstances surrounding the agreement were not that the resolution of May 30, 1930, in Arkansas might be upset, as it was not prior to June 13, 1930, contemplated by anyone that there would be any litigation or contest over the validity of the resolution of May 30, 1930, in Arkansas. It was assumed and agreed by both parties that the rates fixed in the franchise of June 13, 1930, would be valid and binding until such time in the future as the rates in Arkansas might be reduced by a new application on the part of the city filed at some future date, and that was the only contingency contemplated by any of the parties at the time the franchise of June 13, 1930, was passed.

13

Defendant denies that it is now supplying gas to the consumers in the City of Texarkana, Arkansas, at the old and lower rates of 1923, but states that the fact is that it is supplying gas in Texarkana, Arkansas, on the same schedule of rates as those applied for in the City Council of Texarkana, Texas, on November 3, 1933, and which are the same rates that defendant is seeking to establish in Texarkana, Texas.

14

Defendant admits that the City Council of Texarkana, Texas, has ordered it to comply with Section IX of the [fol. 90] franchise as construed by the Council, and to place in effect in Texarkana, Texas, certain lower rates which were heretofore charged in Arkansas, but appeal from such order has been taken to the Railroad Commission of Texas. Defendant denies that it is under obligation to place into effect in Texarkana, Texas, rates which were formerly but which are not now charged in Texarkana, Arkansas. Defendant admits that against its will it has continued to charge only those rates which are specified in its franchise of June 13, 1930, but states that it is necessary to avoid confiscation of its property that it secure reasonable rates.

15

Defendant denies that the gas consumers in the City of Texarkana, Texas, are entitled to an order from this court

directing it at once to place in effect in Texarkana, Texas, the rates which it was but is not now applying in the City of Texarkana, Arkansas; denies that such consumers are entitled to an order and judgment from this court directing it to make refunds to such consumers for the excess collected by it from the time said franchise rates were put into effect in June, 1930, down to the date of the decree herein, over and above the amounts which plaintiff alleges were due to said company under the rates provided in the alleged franchise agreement of 1923. Defendant denies that plaintiff has received from numerous gas consumers in the City of [fol. 91] Texarkana, Texas, assignments to the plaintiff of a part of alleged refunds; and denies that defendant has been notified of any such assignments, and denies that it has been served with a copy of them, and denies that the assignments are valid insofar as this company is concerned, even if they are valid at all, until copies of such assignments are served upon it; denies that if it should ever come to the point where it would be material to consider refunds, that it would be unfair and unjust to permit this defendant to offset against the alleged refunds, any amounts which its gas consumers may owe it.

16

Defendant states that it has for some time been attempting to increase its schedule of rates in furnishing gas to the consumers in Texarkana, Texas; that its efforts have been in accordance with and not in violation of the laws and Constitution of the State of Texas and of the United States.

17

Defendant denies that it is attempting to put into effect the new rates applied for without pursuing the remedies provided by law, but that it is attempting to do so in conformity with the law, but that its efforts so far have proved unavailable.

18

Now comes the defendant, Southern Cities Distributing Company, and by way of affirmative defense and counter [fol. 92] claim and cross bill against the plaintiff, City of Texarkana, Texas, alleges as follows:

19

Defendant here reiterates all those parts of this pleading hereinabove set forth.

20

Defendant states that to protect its property from confiscation, it is attempting to raise the rates of gas to its consumers in Texarkana, Texas, as stated in its application marked Exhibit B to plaintiff's petition. Defendant states that such attempt on its part is not in violation of the law.

21

Defendant states that Section VIII-A of the franchise ordinance referred to in plaintiff's petition is invalid in that it attempts to make binding provisions as to rates, which shall suspend the governmental power of the Council which is subject to exertion at any time. Such governmental power of regulation of rates cannot be suspended for any definite and certain period, but the rates fixed are subject to change at any time thereafter, either upon the initiation of the City or upon the application of the company. Said Section VIII-A of said franchise being unilateral is not binding on the defendant for want of mutuality and for the further reason that the City lacks the power to make any binding agreement which shall hold in abeyance governmental power over rates.

[fol. 93]

22

Defendant, on November 3, 1933, filed an instrument in writing styled "Notice and Application of Southern Cities Distributing Company for Change and Modification of Rates, and Application for New Rates to Go Into Immediate Effect;" said Southern Cities Distributing Company also filed on the 7th day of November, 1933, its "Motion for Prompt Hearing and Action" by the Council on account of daily confiscation, and also filed affidavits as exhibits thereto. The Council thereafter met on the 13th day of November, 1933, and brought up the said application and motion, and refused to give the defendant a preliminary hearing, or any other hearing, but passed a resolution or ordinance dated November 13, 1933, prohibiting the Southern Cities Distributing Company from putting into effect,

even pending hearing, the rates specified in its application. Finally on January 23, 1934, the Council ultimately refused any relief whatever, and defendant has filed an appeal with the Railroad Commission of Texas, which is now pending.

23

Defendant here reiterates the allegations contained in its said application and said motion and affidavits attached to plaintiff's petition, and makes them a part hereof by reference without repeating them at this point.

[fol. 94]

24

Defendant, therefore, states that it has done all it could to get temporary relief and final relief before the Council and before the Railroad Commission of Texas, but it has not succeeded in getting any relief whatever, although it has continued, continues and will continue to suffer daily losses amounting to confiscation, and will have no remedy for what it shall have lost before the state legislative procedure is finished.

25

Defendant states that the City is attempting to give force and vitality to said Section VIII-A of its franchise ordinance, and that such attempts on the part of the City are in violation of the law, and that the said section should be cancelled and annulled.

26

Defendant states that Section IX of its franchise ordinance is invalid for reasons hereinabove stated in its answer.

Without giving defendant any notice or hearing, the City Council of Texarkana, Texas, on December 12, 1933, adopted a resolution which ordered and directed defendant to restore in the City of Texarkana, Texas, the rates for gas which were in effect in said city on and prior to the passage and acceptance of the franchise dated June 13, 1930, and which also directed the City Attorney to call upon the company to refund to its consumers the difference between [fol. 95] the amounts collected under the franchise since May 30, 1930, and the rates which the Council found to have been the lawful rates in Texarkana, Arkansas. An appeal from said resolution of said Council has been filed with the

Railroad Commission of Texas, and such appeal is now pending.

27

That the present fair value of defendant's property used and useful in furnishing natural gas to the consumers in the City of Texarkana, Texas, is in excess of \$518,252.37. That operating under the schedule of rates set forth in the franchise, the gross revenue derived by this appellant in the operation of its said distribution plant in said City of Texarkana, Texas, for the year 1931 was \$306,640.48, while the expenses and charges necessarily incurred in such operation, without any provision for annual depreciation charge, were in the aggregate of \$363,140.79, or a difference of \$56,500.31; for the year 1932, the revenue was \$261,432.54, and the expenses \$327,087.46, or a difference of \$65,654.92; for the year 1933, the revenue was \$242,709.26, and the expenses \$313,173.76, or a difference of \$70,464.50 if the rates applied for are used for the year 1932 the gross revenue would have been \$313,037.29, whereas the expenses were \$27,087.46, or a difference of \$14,050.17. That the revenues for 1933 applying the rates applied for would be less than the revenues of 1932, whereas the expenses were approximately the same, and defendant believes and, therefore, avers that its revenues even under the rates applied for will not be materially increased in 1934 or the very near future, and that its expenses will be increased due to increased prices of material and labor. That appellant for some time past has suffered and is still suffering a daily loss in the operation of its said distribution plant in said city, and unless it is permitted to increase its charges to those applied for as hereinabove stated, it will continue to suffer a daily loss in the operation of its said distribution plant in the said city.

28

That said City of Texarkana, Texas, through its said City Council, claiming to act under authority conferred by the State of Texas, has undertaken and is now undertaking to deprive this appellant of the right to charge such rates, for the services being performed by it in the distribution and sale of gas in said City, sufficient to pay operating expenses and afford it a reasonable return on the fair value of its said property above necessary expenses, and thereby to

confiscate the property of plaintiff and to deprive appellant of its property without due process of law and to deny to plaintiff the equal protection of the laws.

29

That the Fourteenth Amendment of the Constitution of the United States of America provides that no state shall deprive any person of property without due process of law, and guarantees to every person the equal protection of the [fol. 97] laws. That defendant is entitled to the benefit and protection of said constitutional provision, and it now invokes and urges same as against the actions of said City of Texarkana, Texas, and as giving to it the right to increase its charges for the services being rendered in the operation of its gas distributing plant in the City of Texarkana, Texas, in the distribution and sale of gas in said city sufficient to prevent the confiscation of its said property and to earn a reasonable return above its necessary expenses upon the fair value of its property used and useful in rendering such services.

30

Defendant states that the attempts of the city to prevent it from charging the rates applied for, is to impose upon the defendant a daily loss amounting to daily confiscation of its property; that any lower rates will fail to yield revenue sufficient to pay expenses of operation, depreciation, taxes and a reasonable return upon the fair value of its said property. That the attempt of the city to force it to charge less rates than those applied for, if successful, will deprive it of its property to its damage in a sum or value exceeding three thousand dollars (\$3,000.00), exclusive of interest and costs, without due process of law, and deny defendant the equal protection of the laws; that under the Fourteenth Amendment to the Constitution of the United States, no state may deprive any person of life, liberty or property without due process of law, nor deny to any person [fol. 98] within its jurisdiction the equal protection of the laws; and defendant does now plead and invoke said provision of the United States Constitution for the protection of its property. That the attempts of the city to keep defendant from putting into effect less rates than that

applied for, are violative of these provisions of the United States Constitution, and defendant urges said constitutional provisions as a protection against said efforts of said plaintiff.

Wherefore, defendant prays that the temporary injunction be dissolved and set aside, that the petition of plaintiff be denied, and that Sections VIII-A and IX of the franchise ordinance be declared null and void, and be cancelled, and that defendant recover all costs herein incurred, and for such other and further relief, general and special, in law and in equity, to which it may be entitled.

H. C. Walker, Jr., W. H. Arnold, Jr., Arnold & Arnold, King, Mahaffey, Wheeler & Bryson, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 99] IN UNITED STATES DISTRICT COURT

In Equity. No. 109

[Title omitted]

MOTION OF PLAINTIFF TO STRIKE OUT ANSWER AND COUNTERCLAIM OF SOUTHERN CITIES DISTRIBUTING COMPANY—Filed September 24, 1934

To the Honorable Randolph Bryant, United States District Judge:

Comes the plaintiff and moves to strike out the Answer and Counterclaim of the defendant, Southern Cities Distributing Company and for cause shows the Court:

That the facts set out in said answer and counterclaim, if true, are not sufficient to constitute a defense to plaintiff's bill herein.

Wherefore plaintiff prays that such Answer and Counterclaim be stricken out.

Ed B. Levee, Jr., B. E. Carter, Solicitors for Plaintiff.

[File endorsement omitted.]

[fol. 100] IN DISTRICT COURT OF THE UNITED STATES

In Equity. No. 106

[Title omitted]

MOTION TO RECORD CHANGE OF NAME OF THE DEFENDANT,
SOUTHERN CITIES DISTRIBUTING COMPANY, TO ARKANSAS
LOUISIANA GAS COMPANY—Filed January 18, 1935

To the Honorable Randolph Bryant, United States District
Judge:

The Arkansas Louisiana Gas Company, a corporation organized and existing under the laws of the State of Delaware, with its principal office in the City of Dover in the County of Kent, states that an agreement and act of merger between the Southern Cities Distributing Company, Public Utilities Corporation of Arkansas, Arkansas Louisiana Pipeline Company, and Reserve Natural Gas Company of [fol. 101] Louisiana was made on November 27th, 1934, whereby all and singular, the rights, privileges, powers and franchises of the Public Utilities Corporation of Arkansas, Arkansas Louisiana Pipeline Company and Reserve Natural Gas Company of Louisiana, and all of the property, real, personal or mixed, belonging to said corporation, including their respective surpluses and reserves, were vested in the Southern Cities Distributing Company; and pursuant thereto, and thereafter, the articles of incorporation of the Southern Cities Distributing Company were amended so as to change its corporate name to Arkansas Louisiana Gas Company; that the Arkansas Louisiana Gas Company has qualified, and permit has issued to it to do business in the State of Texas according to law.

Wherefore, appearer prays that this Honorable Court enter an order that the name Arkansas Louisiana Gas Company be substituted in all proceedings herein for the Southern Cities Distributing Company and the style of the cause be changed to "City of Texarkana, Texas vs. Arkansas Louisiana Gas Company."

In the United States Circuit Court of Appeals

King, Mahaffey, Wheeler & Bryson, W. H. Arnold,
Jr., H. C. Walker, Jr.

Duly sworn to by T. J. Heard. Jurat omitted in printing.

[fol. 102] [File endorsement omitted.]

IN DISTRICT COURT OF THE UNITED STATES

In Equity. No. 106 and No. 109, Consolidated

[Title omitted]

ORDER THAT THE NAME OF ARKANSAS LOUISIANA GAS COMPANY BE SUBSTITUTED AS DEFENDANT, ETC.—Filed January 18, 1935

On this January 18, 1935 defendant Southern Cities Distributing Company files motion to record change of name of [fol. 103] Southern Cities Distributing Company to Arkansas Louisiana Gas Company. Come the parties and defendant Southern Cities Distributing Company presents said motion for action by the court. The court finds the facts as alleged in said motion.

It is therefore by the court considered, ordered, adjudged and decreed that the name of Arkansas Louisiana Gas Company be and the same is hereby substituted in lieu of Southern Cities Distributing Company.

O.K. W. H. Arnold, Jr., for def.

O.K. Ed. B. Levee, Jr.

[File endorsement omitted.]

ORDER OF CONSOLIDATION

Item 14, Order of Consolidation. Do not copy: state:

“The order is that Case No. 106 and Case No. 109 be consolidated; and that plaintiff’s motion to strike out the answer and counterclaim of defendant in Case No. 109 In Equity be considered as going to and applying also to defendant’s answer and counterclaim in Case No. 106.”

[fol. 104] IN UNITED STATES DISTRICT COURT

No. 109, In Equity (With Which Has Been Consolidated
Suit No. 106, In Equity, Between the Same Parties)

[Title omitted]

SUPPLEMENTAL BILL OF CITY OF TEXARKANA, TEXAS—Filed
December 30, 1936

Comes the plaintiff, the City of Texarkana, Texas, and pursuant to leave heretofore granted by this court on December 18, 1936, files this its Supplemental Bill in this consolidated cause for the purpose of bringing into the record matters and facts arising since the filing of the original bill in both No. 106 and in No. 109 In Equity, and for the purpose of amending its prayers for relief in view of such new matters.

At the time the original bill was filed in No. 109 In Equity, there was pending in the United States District Court for the Western District of Arkansas a suit between the Southern Cities Distributing Company, whose corporate named has since been changed to the Arkansas Louisiana Gas Company and which is the same corporation as the defendant in these suits, and the City of Texarkana, Arkansas, which suit involved the following situation: On October 23, [fol. 105] 1933, said gas company applied to the City Council of the City of Texarkana, Arkansas, for an increase in rates. This application was heard before the City Council of the City of Texarkana, Arkansas in December, 1933, and on December 22, 1933, said City Council denied said application and ordered the gas company not to charge nor collect any greater rates in Texarkana, Arkansas, than those then legally in effect, which rates were the same rates as those described and set out in the franchise contract between said gas company and the City of Texarkana, Texas, of March 13, 1923, a copy of which is attached as Exhibit "A" to the original bills in these suits. In February, 1934, the gas company, being the same company as the defendant in these present suits, filed suit in the United States District Court for the Western District of Arkansas against the City of Texarkana, Arkansas, asking that said rate order should be enjoined, and that it be protected in collecting from the consumers in Texarkana, Arkansas, the higher rates which it had applied for in October, 1933. At the time of the filing

of said suit said gas company applied for and was granted a temporary restraining order, and from February 16, 1934, until December 4, 1936, said gas company collected under said temporary restraining order higher rates than the rates set forth and described in the said franchise contract of March 13, 1923, copy of which is attached as Exhibit "A" to the original bills, and higher rates than those provided in [fol. 106] the franchise of June, 1930, a copy of which is attached as Exhibit "B" to the original bills herein.

On December 4, 1936, the United States District Court for the Western District of Arkansas entered its decree in said suit and dismissed the plaintiff's bill and dissolved the temporary restraining order in so far as said bill and said restraining order affected the rates provided in the order of the Council of Texarkana, Arkansas, made on December 22, 1933, and in said decree the court upheld the validity of the rates described in said order of December 22, 1933, which rates are the same as those described in the franchise between the gas company and the City of Texarkana, Texas, made and agreed to on March 13, 1923, a copy of which franchise is attached as Exhibit "A" to the original bills herein. A copy of this decree of the United States District Court for the Western District of Arkansas, entered on December 4, 1936, is hereto attached as Exhibit No. 1 to this Supplemental Bill and made part hereof.

In said decree of December 4, 1936, said United States District Court for the Western District of Arkansas ordered and directed the gas company to refund to its consumers in Texarkana, Arkansas, all amounts collected under the temporary injunction theretofore granted in said suit over and above the amounts due under the rates which said court found to be legal, same being the same as the rates described and set forth in the franchise for Texarkana, Texas, of [fol. 107] March, 1923, a copy of which is attached as Exhibit "A" to the original bills herein.

Thereafter, on December 16, 1936, the plaintiff gas company in that suit, being the same company as the defendant in this suit, applied to the United States District Court for the Western District of Arkansas for an appeal, for a supersedeas pending said appeal, and for an injunction pending said appeal to protect it in continuing to charge higher rates. On December 16, 1936, said court granted an appeal and granted, conditioned upon the filing of a bond, a supersedeas

pending the appeal from that part of its decree of December 4, 1936, which ordered the gas company to make refunds, but said district court refused to grant an injunction pending the appeal. A copy of said order of December 16, 1936, is hereto attached as Exhibit No. 2 to this Supplemental Bill. The gas company is now furnishing gas to domestic and commercial consumers in Texarkana, Arkansas at the rates which are the same as those described and set forth in the franchise agreement for Texarkana, Texas, of March, 1923, a copy of which is attached as Exhibit "A" to the original bill herein and which rates are much lower than the present rates in Texarkana, Texas, which present rates are the rates contained in the franchise of June, 1930, a copy of which is attached as Exhibit "B" to the original bills.

Plaintiff says that during the period from June, 1930, to December 1, 1933, the gas company collected from its consumers in Texarkana, Texas, and in Texarkana, Arkansas, the same rates, said rates being those described and set forth in the franchise agreement for Texarkana, Texas, of June, 1930, a copy of which is attached as Exhibit "B" to the original bill. On December 1, 1933, the gas company was ordered and directed to refund to its consumers in Texarkana, Arkansas, all amounts collected from them in excess of the amounts which would have been due under rates which were the same as those set forth and described in the franchise agreement for Texarkana, Texas, of March 13, 1923, a copy of which is attached as Exhibit "A" to the original bills. Said decree was final and thereafter said gas company did refund such excess collections to its consumers in Texarkana, Arkansas, in the amount of approximately \$66,000.00. During the period, therefore, from June, 1930, to December 1, 1933, the gas company has received from its consumers in Texarkana, Arkansas, a much smaller rate than it has collected from its consumers in Texarkana, Texas. The City of Texarkana, Texas, has called upon the gas company to make similar refunds for said period to its consumers in Texarkana, Texas, and the defendant gas company, in violation of its franchise agreement, has failed and refused to do so.

During the period from December 1, 1933, to February 16, 1934, the gas company supplied gas to its consumers in Texarkana, Texas, under the rates set forth in the franchise of June, 1930, a copy of which is attached as Exhibit "B"

[fol. 109] to the original bill, and during the same period supplied gas to its consumers in Texarkana, Arkansas, under the lower rates described and set forth in the franchise agreement of March, 1923, a copy of which is attached as Exhibit "A" to the original bill. The City Council of Texarkana, Texas, on December 12, 1933, called upon the gas company to abide by its franchise agreement and to supply gas to its consumers in Texarkana, Texas, at the same rates which it was then using in Texarkana, Arkansas, and said gas company, in violation of its agreement, failed and refused to do so but continued to collect from its consumers in Texarkana, Texas, the much higher rates described and set forth in the franchise agreement of June, 1930, a copy of which is attached as Exhibit "B" to the original bill herein.

During the period from February 16, 1934, to December 4, 1936, the gas company collected from its consumers in Texarkana, Arkansas, higher rates than it actually collected at said time from its consumers in Texarkana, Texas, but it has now been ordered and directed by said Federal Court in Arkansas to refund to its consumers in Texarkana, Arkansas, all amounts collected in excess of the rates described in the franchise agreement of March 13, 1923, a copy of which is attached as Exhibit "A" to the original bill.

Beginning with December 4, 1936, the gas company has been collecting from its consumers in Texarkana, Arkansas, at the rates described in said franchise agreement of March [fol. 110] 13, 1923, but it has continued to collect and is now collecting from its consumers in Texarkana, Texas, the higher rates described in the franchise of June, 1930.

The plaintiff says that it and the consumers of Texarkana, Texas, for whose use and benefit this suit is brought, are entitled to the judgment and decree of this court as follows:

1. Ordering, in the manner hereinafter prayed, an immediate refund of all amounts collected from the defendant's consumers in Texarkana, Texas, during the period from June, 1930, to February 16, 1934, over and above the amounts which would have been due from them under the rates described in said franchise agreement of March 13, 1923.

2. Ordering and directing said defendant gas company to now charge and collect in the City of Texarkana, Texas, no greater rates than those provided in said franchise agree-

ment of March 13, 1923, being the rates put into effect in Texarkana, Arkansas, on December 4, 1936, and ordering a refund in a similar manner of all amounts collected from consumers in Texarkana, Texas, since December 4, 1936, over and above the amounts which would have been due under the rates put into effect in Texarkana, Arkansas, on December 4, 1936.

3. Ordering the defendant gas company to deposit in the registry of this court, or in some depository, designated by this court, all amounts collected from its consumers in Tex-[fol. 111] arkana, Texas, during the period from February 16, 1934, to December 4, 1936, over and above the amounts provided by the rates in said franchise of March 13, 1923; that the same should be held pending the determination of the appeal in the case affecting the rates in Texarkana, Arkansas, and that if the decree of said Arkansas court of December 4, 1936, should be affirmed that said amounts should be thereupon paid to said consumers in Texarkana, Texas, under the further order of the court.

Premises considered, plaintiff, for its own use and benefit and as the representative of and as trustee for all the consumers of gas in the City of Texarkana, Texas, and for use and benefit of all such gas consumers, prays:

1. That the defendant be ordered and directed to comply with Section IX of its franchise agreement of June, 1930, and to place in immediate effect in Texarkana, Texas, the rates for gas which it is now collecting in Texarkana, Arkansas.

2. That the defendant be ordered and directed to file with the Clerk of this court, and to furnish a copy to plaintiff, within thirty days, a statement, verified by the oath of its chief accounting officer, showing as to each consumer in Texarkana, Texas, all monies collected under the rates provided under the franchise of June 13, 1930, from the time such rates were put into effect down to the date of the decree herein, showing as to each consumer his name and address, [fol. 112] the amount collected from each consumer, the amount due from each under the rates provided in the franchise of March 13, 1923, and the difference between the amount so collected and the amount so due; and that said statement should be divided into three periods, one covering

from June 13, 1930, to February 16, 1934, one from February 16, 1934, to December 4, 1936, and one from December 4, 1936, to the date of the decree herein.

3. That the defendant be ordered and directed at the time of filing such statement to pay into the registry of this court the entire amount collected by it from its consumers in Texarkana, Texas, in excess of the amount which should have been collected under the rates provided in the franchise of March 13, 1923, without any offsets, setoffs or counterclaims of any kind whatsoever arising since the filing of these suits, plus all the fees, costs and commissions to which the Clerk may be entitled for paying out such moneys to the persons who may be then entitled to receive the same; that the plaintiff and the consumers be afforded access to the books of the company for the purpose of checking such statement and be allowed a reasonable time within which to call any errors to the attention of the court.

4. That the amount so deposited which represents the excess collections from June, 1930, to February 16, 1934, and from December 4, 1936, to the date of the decree herein, be now paid out by the Clerk to the persons from whom collected after the City has been given a reasonable opportunity to present for the consideration of this court its claims against such amounts on account of assignments [fol. 113] and on account of attorneys' fees and the expenses of this litigation.

5. That the amount of the excess collected during the period from February 16, 1934, to December 4, 1936, be held in the registry of the court pending decision of the appeal in the Texarkana, Arkansas, gas rate case.

6. For judgment for its costs and for all other necessary or proper relief.

Ed B. Levee, Jr., City Attorney. B. E. Carter, Attorneys for Plaintiff.

EXHIBIT No. 1 TO SUPPLEMENTAL BILL

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF ARKANSAS, TEXARKANA DIVISION

In Equity. No. 219

ARKANSAS LOUISIANA GAS COMPANY, Plaintiff

v.

CITY OF TEXARKANA, ARKANSAS et al., Defendants

DECREE

On this the 4th day of December, 1936, a day of the regular November, 1936, Term of the United States District Court of the Western District of Arkansas, Texarkana Division, this cause comes regularly on to be heard, the court having heretofore considered the evidence taken before the Master herein and the reports heretofore filed by said Master and the exceptions filed by the parties herein to said reports, and having heard the argument of counsel thereon and having considered the additional evidence requested [fol. 114] by the court on such argument and thereafter filed herein, by the plaintiff, and the court having heretofore, on October 31, 1936, filed herein its Memorandum Opinion in this case, and having approved and adopted Findings of Fact and Conclusions of Law found to be in conformity with said opinion, the court now finds:

On October 23, 1933, the plaintiff in this suit, whose corporate name was then the Southern Cities Distributing Company and is now the Arkansas Louisiana Gas Company, filed with the City Council of the City of Texarkana, Arkansas, an application for an increase in rates for the gas distributed by it in said City; that, after hearings, said City Council on December 22, 1933, ordered said plaintiff gas company not to increase its rates and to continue to supply gas to the consumers in the City of Texarkana, Arkansas, at the then existing rates, except for some changes as to industrial rates made at the request of the company and which are not material here; that in said order of December 22, 1933, said Council continued said rate matter for the purpose of considering whether a reduction in the then existing rates should be ordered; that on February 13, 1934, said City Council did order a reduction in rates; that thereupon the plaintiff immediately filed its bill in this suit in which bill it

alleged that said order of December 22, 1933, by refusing to allow it to increase its rates, operated to deprive it of its property without due process of law, that said order of February 13, 1934, also operated to deprive it of its property without due process of law, and that any rates less [fol. 115] than those set forth in its application to the Council of October 23, 1933, were confiscatory and that it was entitled to collect such rates; and in which bill it prayed that the enforcement of said rate order of December 22, 1933, be enjoined, that the enforcement of said order of February 13, 1934, also be enjoined, and that the defendant city and its Mayor and aldermen and the consumers in said city be enjoined and restrained from interfering with the plaintiff in collecting the rates set forth in its application of October 23, 1933; and said plaintiff prayed for a temporary injunction and restraining order to protect it in charging such increased rates so applied for pending a trial and decision in this suit; that on February 16, 1934, this court did make and enter a temporary injunction and restraining order in the terms prayed for in said bill conditioned upon plaintiff furnishing a bond to protect the consumers as to any overcharge of rates and interest thereon that might be adjudged due them, and that, plaintiff having made the bond required by said order of February 16, 1934, and having since furnished the further security subsequently required by the court, has, since February 16, 1934, been charging to and collecting from its consumers in Texarkana, Arkansas, under and by virtue of said temporary injunction and restraining order, the rates for gas set forth and described in its said application of October 23, 1933, which said rates so charged and collected are higher than the rates which the plaintiff was authorized and ordered to charge and collect [fol. 116] under the rate order and resolution of the City Council of December 22, 1933.

The court finds that the rates set out and prescribed in the rate order and resolution passed by the City Council of the City of Texarkana, Arkansas, on December 22, 1933, are and were just and legal rates, that same are not confiscatory and do not deprive plaintiff of its property without due process of law, that said rate order and resolution of December 22, 1933, was and is a valid and legal order and a legal and valid exercise of the rate making power and jurisdiction of said City Council, that plaintiff is not entitled to an injunction as to said rates and that as to such rates the plaintiff's

bill should be dismissed for want of equity and the temporary injunction should be dissolved and that judgment should be entered in the terms of the prayer in defendant's answer against the plaintiff and the sureties on its bonds herein to refund to the consumers in said city all amounts collected from them since February 16, 1934, for gas supplied before or since that date, in excess of the amounts which would have been due for such gas under said Council's order of December 22, 1933, if the enforcement of the same had not been temporarily enjoined, together with interest thereon at the rate of 6% per annum from the date such excess was collected until such refund be made.

The court finds that the rates established by the order of the Council of February 13, 1934, are confiscatory and should be permanently enjoined, and that the invalidity of [fol. 117] said order of February 13, 1934, leaves said rate order of December 22, 1933, in full force and effect.

It is therefore, by the court, considered, ordered, adjudged and decreed:

That the defendants, the City of Texarkana, Arkansas, and its Mayor and Aldermen, be and they hereby are enjoined and restrained from enforcing against the plaintiff the reduced rates set forth in the rate resolution and order passed by the City Council of said City on February 13, 1934; and,

That the temporary restraining order issued herein on February 16, 1934, be dissolved, set aside and annulled in so far as it restrains the enforcement of the resolution and rate order of the City Council passed on December 22, 1933, and in so far as it protects plaintiff in charging and collecting any other or higher rates than those set forth in said order and resolution of December 22, 1933; and that plaintiff's bill be dismissed for want of equity in so far as it alleges that the rates set forth in said order of December 22, 1933, are invalid for any reason and in so far as it seeks to enjoin the enforcement of said order or seeks to protect plaintiff in charging any other or higher rates than those directed therein; and,

That the plaintiff and the sureties upon its bonds heretofore filed herein be and they hereby are ordered and directed, in the manner and upon the terms herein set out, to refund to the persons from whom it has collected for gas sold in [fol. 118] the City of Texarkana, Arkansas, either before or after February 16, 1934, all amounts collected since Feb-

ruary 16, 1934, in excess of the amounts which were due from each of such consumers for such gas at the rates and upon the terms provided in the resolution and order of the Council passed on December 22, 1933, together with interest on such excess amounts from the date of payment of same to the date of such refund at the rate of 6% per annum. Said refunds shall be made in the following manner:

1. The plaintiff is ordered to file in this court, and to furnish a copy to the defendants, within thirty days from this date, a statement, duly verified by the oath of its chief accounting officer, showing the names of each and all the consumers from whom it has collected, for gas sold in the City of Texarkana, Arkansas, any amounts in excess of the amounts due from each such consumer under the rates prescribed in said resolution of December 22, 1933, and that said statement show as to each such consumer the amount collected and the amount which should have been collected under such resolution and the date of each such collection, the amount of the total excess collected and the interest due thereon from the date of collection.

2. That the plaintiff make available to the defendants in the City of Texarkana, Arkansas, its books and records showing the gas consumed by each consumer each month and the amounts collected therefor, and that defendants [fol. 119] be permitted to check said statement of refunds and interest thereon.

3. That plaintiff not make any refunds to any consumer until the further order of the court respecting expenses of the city and attorneys' fees, and that plaintiff be not permitted to set off against the refunds due any consumer, in so far as costs, expenses and attorneys' fees are concerned, any amounts falling due to plaintiff or incurred after November 1, 1936.

4. That defendants have and recover from plaintiff all their costs in and about this suit expended.

5. That the court retain jurisdiction of this cause for the purpose of passing upon the question of attorneys' fees and expenses of the city in connection with this suit.

Plaintiff excepts to each of the findings and orders of the court.

(Signed) Heartsill Ragon, Judge.

Entered Dec. 4, 1936.

EXHIBIT No. 2 TO SUPPLEMENTAL BILL

IN THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF
ARKANSAS, TEXARKANA DIVISION

Equity. No. 219

ARKANSAS LOUISIANA GAS COMPANY, Plaintiff,

vs.

CITY OF TEXARKANA, ARKANSAS et al., Defendants

ORDER

The plaintiff, Arkansas Louisiana Gas Company, having duly filed its petition for appeal from the decree in the above [fol. 120] entitled cause to the United States Circuit Court of Appeals for the Eighth Circuit, together with an assignment of errors, and having filed a motion for an order to be made fixing the amount of security which plaintiff should give and furnish upon said appeal, and having petitioned that upon giving of said security all further proceedings of this court be suspended and stayed and that the temporary injunction heretofore granted be continued in effect until the final determination of said appeal, and the defendants having filed herein their response to said application for an injunction pending said appeal; the court finds that said appeal should be granted but that plaintiff is not entitled to an injunction pending its appeal.

The court further finds that the plaintiff has heretofore filed bonds herein to the extent of \$75,000.00, and that order to supersede the orders and judgment of this court that refunds are due the consumers, additional security in the sum of \$50,000.00 is necessary.

It is therefore by the court ordered that the Arkansas Louisiana Gas Company, plaintiff in the above entitled cause, be and it is hereby granted an appeal from the final decree in this cause to the United States Circuit Court of Appeals for the Eighth Circuit.

That upon said plaintiff, Arkansas Louisiana Gas Company filing with the Clerk of this court a good and sufficient bond in the sum of \$50,000.00, to the effect that if the said plaintiff shall prosecute said appeal to effect and answer [fol. 121] all damages and costs and shall make all refunds which may be due if it fails to make its plea good, then the

said obligation to be void, otherwise to be and remain in full force and effect, the said bond to be approved by the court, that all further proceedings in this court adjudging refunds to be due to the consumers, be, and they hereby are suspended and stayed until the final determination of said appeal. Said bond shall be in addition to the security of the bonds heretofore filed in this cause by the plaintiff, and this order shall not operate to release the plaintiff nor the sureties upon said former bonds from their liability under said bonds in the event the final decree herein is affirmed.

This 16th day of December, 1936.

(Signed) Heartsill Ragon, United States District Judge.

[File endorsement omitted.]

[fol. 122] IN UNITED STATES DISTRICT COURT

Consolidated Cases Nos. 106 and 109, in Equity

[Title omitted]

SEPARATE AMENDED ANSWER OF DEFENDANT, ARKANSAS LOUISIANA GAS COMPANY, TO PLAINTIFF'S ORIGINAL AND SUPPLEMENTAL PETITION, AND COUNTERCLAIM OF ARKANSAS LOUISIANA GAS COMPANY—Filed July 14, 1937

To the Honorable Judge of said Court:

Comes Arkansas Louisiana Gas Company and with leave of the Court first had and obtained, files this its Separate Amended Answer to Plaintiff's Original and Supplemental Petition and its Counterclaim, and asks that it be considered as an addition to defendant's pleadings in Cases Nos. 106 and 109; and shows the Court:

This defendant admits that the City of Texarkana, Texas is a municipal corporation chartered and incorporated under and by virtue of the laws of the State of Texas; that defendant is a corporation doing business in said City and owning the gas distribution plant therein.

[fol. 123]

I

Defendant admits that the City of Texarkana, Texas is a municipal corporation; it was incorporated under special

charter, not by Act passed November 2, 1905, but by special Act of Legislature approved May 2, 1907, effective 90 days thereafter. Said Act defines and limits its powers. Said Act is pleaded and reference is made to its terms for certainty. Said City was not incorporated under the general laws of the State.

Southern Cities Distributing Company was the name of the defendant at the time the suit was filed. However, as shown by motion and order of this Court, the name of said defendant has been changed to Arkansas Louisiana Gas Company. Said corporation owns and operates the natural gas distributing plant in the City of Texarkana, Texas.

Defendant admits that on March 13, 1923 an ordinance of the City of Texarkana, Texas was passed; but states it was an amendment to the original gas franchise granted in the year 1905 and expiring in the year 1930. It was in 1923 owned by Southwestern Gas & Electric Company, then the owner of the gas plant in said City. The only effect of the ordinance of March 13, 1923 was to change and prescribe a certain schedule of rates for gas. Defendant denies that the ordinance had any effect other than to prescribe rates; the terms thereof are referred to for further certainty. Said ordinance of March 13, 1923 and gas franchise are admitted to have been in 1928 assigned to defendant. However, they [fol. 124] both expired by their terms and were replaced and completely superseded by an ordinance of June 13, 1930 which granted a new 25-year franchise to defendant in the City of Texarkana, Texas; Section V thereof prescribed the rates to be charged. Defendant admits said franchise was accepted by it, but denies that it agreed to carry out all of the terms of said ordinance, and especially denies being bound by Section IX thereof, or by Section VIII-A thereof, and denies it is estopped from questioning any of its terms or conditions, and especially as to seeking an increase in rates to meet developing conditions.

Defendant admits that in 1930 it applied to the City Council of Texarkana, Texas for increase in gas rates; after hearing the city council rejected the application; defendant appealed to the Texas Railroad Commission; said commission came to Texarkana, Texas and conducted hearings on said application on May 28th and 29th, 1930. Defendant denies that, while the hearings were going on and while testimony was being taken before the Commission, defendant proposed to the city council a compromise of said rate con-

troversy. Defendant denies that no findings were made and no order was entered by the Commission; denies that the ordinance passed by the council was in the nature of a franchise agreement insofar as the rate provisions were concerned; defendant states that Section V prescribing the rates was in pursuance of the power of the city council over rates.

[fol. 125] Defendant states that the ordinance and the action of the defendant with reference thereto are in writing as shown by the petition and speak for themselves, reference being made to the writings for certainty as to contents. Defendant states that on the application of 1930, hearings were had and voluminous testimony and exhibits were introduced in the council and that the ordinance itself so records it. When appeal was taken by defendant to the Railroad Commission of Texas in 1930 from the refusal of the city council, there were full hearings and voluminous testimony and exhibits introduced before the Commission. While the hearings before the Railroad Commission were in progress, a new schedule of rates was proposed by plaintiff. Whereupon proceedings were reopened in the city council; new rates were prescribed; a new franchise was granted by ordinance dated June 13, 1930. The Railroad Commission approved the new rates prescribed by the city council and dismissed the appeal then pending before it.

The rates prescribed by the city council in Section V of the ordinance of June 13, 1930 were put into effect and have been charged at all times since. Said rates set forth in Section V of the ordinance of June 13, 1930 read in part as follows:

Section V. A hearing as to the rates which shall be charged by the Grantee having been had, and the Grantee having waived any right to notice of the fixing of such rates, [fol. 126] the rates to be charged by the Grantee for natural gas furnished under the provisions of this Ordinance are hereby determined and fixed by compromise agreement, said rates are as follows, to-wit:

Domestic and Commercial Rate

(a) For the first one thousand (1000) cubic feet per meter of gas or fraction thereof sold to any domestic or commercial consumer during any one month—\$1.00 per thou-

sand cubic feet. Said charge shall also be made regardless of whether any gas is consumed or not.

(b) For the next one hundred and forty-nine thousand (149,000) cubic feet of gas or fraction thereof sold to any domestic or commercial consumer during any one calendar month—\$.50 per thousand cubic feet. All gas sold at \$.50 per thousand cubic feet is subject to 5% discount if paid within ten (10) days after bill is rendered.

(c) For all gas sold to any one domestic or commercial consumer during any one calendar month in excess of one hundred fifty thousand (150,000) cubic feet—\$.25 per thousand cubic feet. All gas sold at \$.25 per thousand cubic feet is subject to \$.02 per thousand cubic feet discount if paid within ten days after bill is rendered.

A charge of \$1.00 shall be made for each connect or disconnect, after first installation, that is made for the same consumer, at the same address, except where meter is removed to be replaced, repaired or for inspection.

[fol. 127] Churches, schools or colleges maintained by State, County or City; schools or colleges maintained by any religious organizations; public hospitals, shall be allowed a gross discount of 40% from the gross rate for domestic and commercial gas when bills are paid within ten days after being rendered. Municipal buildings shall be allowed free gas for all gas used in conducting the city's business.

Defendant admits that the franchise ordinance of June 13, 1930 is a binding contract as pertains to the franchise. However, the rate provisions of Section V derive their force, not from the contract, but from the exertion of regulatory power; Section VIII-A and Section IX dealing with rates are invalid and not binding as contracts; they are in conflict with the provisions of the city charter, laws and Constitution of the State of Texas regarding the regulatory power, and are inapplicable to the case at bar. Defendant denies that it is estopped from questioning the validity of Sections VIII-A and IX of said ordinance, or the application thereof.

Defendant admits that the ordinance of June 13, 1930 has not been amended, modified or repealed, except that by the procedure adopted defendant is entitled to increase them. Defendant denies that no attempt has been made to amend,

modify or repeal said ordinance; defendant has attempted to amend and change the rates and is entitled to charge the rates filed in the city council on November 3, 1933.

[fol. 128] Defendant admits that on November 3, 1933 it filed with the city council Notice and Application for Change and Modification of Rates, giving the scale of rates, copy of which is attached as Exhibit "C" to plaintiff's petition. Defendant denies that its notice and efforts to place into effect the rates proposed and filed by it were in violation of any valid or applicable provision of the franchise, but avers that the procedure was in accordance with the laws and Constitution of Texas and with the rights of defendant. In this connection defendant calls attention to the statement and admission of plaintiff that the question raised by plaintiff as to non-compliance with Section VIII-A has now become moot.

Defendant admits that on November 4, 1933 it filed with the City Secretary the instrument in writing quoted in plaintiff's petition.

Defendant admits that the city council on November 14, 1933 passed a resolution, the contents of which will appear by reference to its terms.

Defendant admits that the council had a full hearing on January 22nd and 23rd, 1934, and considered the evidence presented by plaintiff and defendant and passed a resolution on the latter day denying the application for increase in rates, all of which will appear by reference to the terms of said resolution.

Defendant admits that it thereupon appealed to the Railroad Commission of Texas from said order of the city council denying defendant's application and asked that the Railroad Commission establish and fix the rates sought by defendant. Defendant denies that such appeal was in violation of any valid provision of the ordinance of June 13, 1930.

Defendant denies that on March 12, 1934 the Railroad Commission of Texas made an order allowing said appeal on condition that the company give bond in the sum of ten thousand (\$10,000.00) dollars; denies that the Railroad Commission ordered that the action of the city council of January 23, 1934 be suspended or superseded on the filing and approval of such bond. The bond required by the Commission related to an altogether different resolution; to the resolution of December 12, 1933 which as admitted by plain-

tiff was not a rate-reducing order and of which the Railroad Commission had no jurisdiction. The Railroad Commission did have jurisdiction of the appeal from the order of January 23, 1934, but the Railroad Commission refused and still refuses to take any action on said appeal. Defendant is without any other administrative remedy and is entitled to call upon the Court in this case as well as in Case No. 106.

Defendant denies that Section VIII-A of the ordinance of June 13, 1930 constitutes a valid and binding waiver by defendant of any right it may have under the statutes of the State of Texas to seek and secure an increase in rates; denies that Section VIII-A is valid; denies that it is necessary to give one-year's notice before an increase in rates should be applied for; denies that the attempt to secure an increase in rates by appeal to the Railroad Commission is in violation [fol. 130] of any valid provision of the ordinance of June 13, 1930; denies that defendant waived its right to secure increased rates, except one-year's notice of its intention to apply for same; denies that the Railroad Commission is without jurisdiction of the appeal from the order of January 23, 1934; denies that the Railroad Commission is without power over said appeal. Defendant admits that the rates prescribed in the ordinance of June 13, 1930 are and were the only legal and lawful rates chargeable in Texarkana, Texas until November 23, 1933, at which time defendant alleges it had the right to charge increased rates by virtue of the administrative proceedings and by virtue of the prescribed rates or any less rates than applied for being confiscatory. Defendant denies that, if there is a contract as to rates, the Railroad Commission is without power to relieve defendant from such contract. Defendant denies that plaintiff is entitled to an injunction restraining defendant from proceeding with said appeal, or restraining those defendants who are members of the Railroad Commission from entertaining said appeal and from taking any action thereon and from taking any action with reference to the gas rates in the City of Texarkana, Texas; denies that plaintiff is entitled to such injunction at any time or until plaintiff has complied with the provisions of the ordinance of June 13, 1930 in reference to one-year's notice. If material, defendant shows to the Court that it properly gave the one-year's notice quoted in plaintiff's petition and in this answer [fol. 131] infra; but such notice was not a validation of Section VIII-A of the ordinance of June 13, 1930 or waiver

of any defendant's rights; nor did it have the effect to change the laws and Constitution of the State of Texas and of the special charter of the City of Texarkana, Texas with reference to rates. Defendant makes further allegations with reference to Section VIII-A of the ordinance of June 13, 1930, *infra*.

II

Defendant denies that the statutes of the State of Texas confer upon plaintiff, as representative of gas consumers, the right to make contracts for rates at which gas should be distributed; or contract as alleged by plaintiff.

Defendant denies that under such alleged powers plaintiff entered into a contract with Southwestern Gas & Electric Company dated March 13, 1923. An ordinance increasing rates was passed upon said date but it was not a contract as to rates; nor was it a franchise. Said ordinance of March 13, 1923 and the franchise existing at that time have expired by their terms and have been completely superseded by the ordinance of June 13, 1930. Article E was invalid and has expired and been superseded. Defendant denies that Article E was ever agreed to by defendant; denies it is now in force or valid or binding as a contract. If it were material, it would be invalid for the same reasons shown *infra* in relation to Section IX. Defendant denies that any alleged franchise of 1923 was transferred by said Southwestern Gas & Electric Company to defendant.

[fol. 132] Defendant admits that the ordinance of June 13, 1930 was accepted by the written instrument quoted in petition of plaintiff; and admits that it contained the following provision:

"Section IX. If Grantee shall be finally compelled to, or should voluntarily, place in any rates in the city of Texarkana, Arkansas less than the rates granted by this Ordinance, then and thereupon the lessened rate shall apply in the city of Texarkana, Texas, and Grantee shall not be authorized or permitted to charge and collect any higher rate."

Defendant denies that said Section IX is in force or valid or binding as contract or applicable; denies that it is a binding contract on the part of the plaintiff, or on the part of defendant; denies that said provision is a just and proper provision to prevent alleged discrimination against the gas consumers

in Texarkana, Texas, or for any other purpose; denies that defendant's acceptance of the ordinance amounted to an acceptance or contract as to Section IX thereof; if it should be so construed, it would be conditioned upon the legality of same and the conditions which would authorize a change; denies that defendant agreed to Section IX as a compromise agreement to secure the granting of increased rates which were granted at the time.

Defendant denies that the City of Texarkana, Texas, and the City of Texarkana, Arkansas, are one community; but [fol. 133] admits that they are in fact separated by state line—one city being in the State of Texas and the other being in the State of Arkansas; the laws applicable to each city are materially different in many respects; defendant denies that consumers of Texarkana, Arkansas, are served from the same mains as consumers of Texarkana, Texas. The gas which is furnished said cities is delivered from pipe line system owned, formerly by Arkansas Louisiana Pipeline Company but, now owned by the defendant. Defendant denies "said provision does not waive any of the rate regulating powers conferred upon the city council by the statutes of the State of Texas." Defendant states that said provision is invalid because in conflict with the special charter of Texarkana, Texas, and with the laws and Constitution of the State of Texas. Defendant denies that said action is a just and proper provision to prevent discrimination against consumers in Texarkana, Texas; nor can it be sustained on such ground; defendant denies there has been any unlawful discrimination. Defendant denies that either of said provisions were within the corporate powers of defendant. Defendant denies that it proposed such agreement; states it was initiated and inserted by the city council.

Defendant denies that an alleged similar compromise agreement was entered into between defendant and the City of Texarkana, Arkansas; denies that referendum petitions against said alleged compromise agreement were at once circulated at Texarkana, Arkansas; denies that they were [fol. 134] given a great deal of publicity in the newspapers; denies that the alleged circulation and publicity took place prior to the action of the City Council of Texarkana, Texas, on June 13, 1930 in passing the ordinance of said date; denies that it was then contemplated by both parties that said alleged compromise agreement in Arkansas might be upset by said alleged referendum petition; denies that said

petitions had any bearing on or reference to the city of Texarkana, Texas; defendant denies that Section IX was designed to take care of the situation in the event said alleged compromise agreement should be upset in Texarkana, Arkansas. There was no change in rates in Texarkana, Arkansas legally after May 8, 1923; the rates prescribed on May 8, 1923 by the City Council of Texarkana, Arkansas were the only lawful or legal rates in said city of Texarkana, Arkansas.

When the ordinance of June 13, 1930 was passed and approved by the City Council of Texarkana, Texas, there had already been passed a Resolution of May 30, 1930 by the City Council of Texarkana, Arkansas as to a similar scale of rates.

As Section IX was then construed and acted upon, it was not contemplated that any rates which had in the past been prescribed by the City Council of Texarkana, Arkansas should be brought forward to govern and control future charges which defendant could collect as applicable rates to its distribution and sale of natural gas in said City of Texarkana, Texas. Following said action, first by the City Council of the City of Texarkana, Texas in prescribing rates [fol. 135] in Section V of the ordinance of June 13, 1930, a number of voters all of whom were of the City of Texarkana, Arkansas, under a referendum amendment of the State of Arkansas, petitioned said City of Texarkana, Arkansas, to submit to the voters of said City at an election the question of approval or disapproval by said voters of the action of said City Council of Texarkana, Arkansas, in passing the Resolution of May 30, 1930 in said City. The city council refused said petition, but later on the petition was sustained by mandamus and an election was held. Said voters had an interest to serve in the result of the election in that it was to their pecuniary advantage to keep the rates to be charged them for natural gas down to the lowest figure possible, and as a result of said election, the said action of said City Council of Texarkana, Arkansas was revoked and it was held in the federal courts in Arkansas that the rates which had been fixed by action of said City Council of Texarkana, Arkansas on May 8, 1923 were continued in effect to prevail until changed by further appropriate action; said 1923 rate in Texarkana, Arkansas was less than the rates prescribed in the June 13, 1930 ordinance of Texarkana, Texas.

It is these rates prescribed by the City Council of Texarkana, Arkansas on May 8, 1923 which the said City Council of the City of Texarkana, Texas, is seeking to have applied in the City of Texarkana, Texas, under and by virtue of its construction of said Section IX. The method so used to bring [fol. 136] about a reduction of the rates in Texarkana, Texas is contrary to and in violation of the authority delegated by the legislature of the State of Texas to the City of Texarkana, Texas, with reference to determining rates, as is apparent from the provisions of the charter of said city constituting such delegated powers, which will be hereinafter copied in this pleading. Such method was not within the contemplation of either the City Council of the City of Texarkana, Texas, or of defendant at the time of the adoption of said franchise ordinance of June 13, 1930. As is apparent from the facts and circumstances herein alleged and the law herein referred to, the method so used to procure a continuation of the rates of May 8, 1923, in the City of Texarkana, Arkansas, is wholly illegal as applied to rates in the City of Texarkana, Texas, and unenforceable as against this defendant.

As a result of the existing rates under said ordinance of June 13, 1930, and the refusal of the said City of Texarkana, Texas to increase such rates, this defendant is suffering a daily loss and will continue to suffer such loss unless and until the rates which it may charge have been increased. If defendant should be compelled to apply any lower rate than that fixed by said ordinance of June 13, 1930, the daily and annual loss will be proportionately increased as the rate is lowered, and defendant will continue to suffer such loss unless and until the rates which it may charge have been increased. That as a result of the imposition upon it of said [fol. 137] rates, defendant's property used and useful in the City of Texarkana, Texas, for the sale and distribution of natural gas has to a considerable extent been confiscated, and is being confiscated and unless the rates which it may charge shall be increased, it will soon suffer complete confiscation, and will thereby sustain an irreparable loss and injury. That under the circumstances the defendant is entitled to increase its rates in the supply and sale of natural gas in said City of Texarkana, Texas to a sufficient amount to afford it a reasonable return upon the fair value of its said property, and under the laws of the State of Texas and the charter of said City of Texarkana, Texas is entitled to

at least eight per cent, if not ten per cent, return on the fair value of its said property; and under the circumstances is entitled to prevent the said City of Texarkana, Texas, acting through its said City Council, composed of its Mayor and Board of Aldermen, from enforcing the rates which it has been and is now imposing upon this defendant, and which it seeks to impose upon this defendant, and from interfering with the rate which may be put in force by this defendant, provided such rate is found, as alleged, not to give it a return on the fair value of its property.

That the actions complained of by the said City Council of Texarkana, Texas are contrary to the Constitution and laws of the State of Texas, and to its city charter, by the terms of which it derives its power and authority to fix rates for the distribution and sale of natural gas within the limits of said City. That the sole and only power and authority of said City and its said city council to fix rates is to be found in the sections of its said city charter quoted below and in the statutes of the State of Texas.

That the power and authority of said City of Texarkana, Texas and its city council to grant franchises and fix rates is coupled with the unconditional requirement that it must be by ordinance, and that it must contain all the terms and agreements between the parties thereto, and which means the ordinance cannot have incorporated in it some indefinite provision to perhaps become definite when and if certain contingencies arise and when and if something may be done by some other tribunal or court, or which may result from some election in some other jurisdiction.

That the power and authority of said City of Texarkana, Texas, and its City Council to grant franchises and fix rates is coupled with the unconditional requirement that it must be by ordinance, and that the rates granted and fixed must be sufficient to yield at least ten per cent net on the actual cost of the physical properties, equipment and betterments being used and useful in said City in performing the services undertaken by the use of such property (Section 196). The exercise of such power and authority is also coupled with the condition imposed by the statute of Texas which requires that the rate fixed be sufficient to yield such returns on the fair value of such property.

That as is apparent from the facts and circumstances herein alleged, and the law referred to, including the pro-[fol. 139] visions of the charter of said City of Texarkana,

Texas, said city acting through its said City Council, is imposing upon this defendant continuous substantial loss in operating its properties in said City in the distribution and sale of natural gas, and which has resulted in considerable confiscation, and is resulting in considerable confiscation of its said properties to its great irreparable injury and loss; and that said City and its said city council is doing so without authority of law, but in violation of the express provisions of the Constitution and laws of Texas and of the provisions of the said charter of said City; and also in violation of that portion of the Constitution of the United States commonly known and referred to as the Fourteenth Amendment, wherein it provides that no person shall be deprived of his property without due process of law.

The defendant expressly pleads and urges the Constitution and laws of Texas referred to and the provisions of the charter of said City herein copied, and the provisions of the Constitution of the United States herein referred to against all of the said actions taken by said City of Texarkana, Texas, and its said city council, and in protection of its rights and especially in protection of its property against confiscation.

Defendant states that the decree of December 1, 1933 in the District Court of the United States for the Western District of Arkansas resulted from a suit by defendant in Texarkana, Arkansas to increase its rates in said city and was [fol. 140] to the effect that the rates in Texarkana, Arkansas had never been lawfully changed since May 8, 1923 and that the administrative remedy had not been properly exhausted to entitle defendant to have a hearing in court on the merits. Said decree did not and could not, as a court, fix rates, but held that the rates passed on May 8, 1923 by the City Council of Texarkana, Arkansas, by force of the referendum election in that City and by reason of not exhausting the administrative remedy, were continued in force and remained valid and unchanged for all purposes, and that defendant was not at that time entitled to an injunction to increase rates in Texarkana, Arkansas.

Defendant admits that it had refused to place the Arkansas rates of May 8, 1923 into effect in Texarkana, Texas: admits that it has charged in Texarkana, Texas exclusively the rates prescribed by the City Council of Texarkana, Texas in Section V of the ordinance of June 13, 1930 since

it went into effect. Defendant denies that it is unlawfully discriminating against the consumers of Texarkana, Texas, and denies there has been any legal or lawful change in the rates in Texarkana, Arkansas since May 8, 1923.

Defendant denies that gas consumers in the City of Texarkana, Texas are entitled to an order directing defendant to at once place into effect in the City of Texarkana, Texas, lower rates provided in the superseded and terminated alleged franchise of March 13, 1923; denies that the consumers are entitled to refunds. Defendant states that the decree in the Arkansas Federal Court held that the only [fol. 141] lawful gas rates in Texarkana, Arkansas were those prescribed in an ordinance of May 8, 1923 passed by the City Council of Texarkana, Arkansas and that administrative remedy had not been properly exhausted to change them. Defendant hereinafter fully sets forth its position in regard to Sections VIII-A and IX of the ordinance of June 13, 1930.

Defendant being without sufficient information to form a belief denies that plaintiff has received from numerous gas consumers in the City of Texarkana, Texas assignments to plaintiff of part of such alleged refunds; denies that defendant is deprived of any right of offset on or after the filing of plaintiff's petition or at any other time.

Defendant denies that plaintiff and the gas consumers are without any adequate remedies at law. Defendant admits that if it were able to do so, it would prosecute its appeal before the Railroad Commission of Texas, and secure the rates it applied for. Defendant states that the members of the Railroad Commission will not proceed with the hearing of defendant's appeal. Defendant denies that plaintiff will be damaged in any sum.

1. Defendant denies that plaintiff is entitled to any order of this Court; denies that plaintiff is entitled to any injunction; or to an injunction restraining defendant from putting into effect an increase in rates in the City of Texarkana, Texas, except after having given one-year's notice, [fol. 142] or restraining defendant from putting into effect increased rates at any time or in any manner except at the time and in the manner which plaintiff alleges is provided in the franchise ordinance; denies that plaintiff is entitled to an order restraining defendant from prosecuting and from taking any further steps on the appeal which has been

lodged with the Railroad Commission of Texas; denies that plaintiff is entitled to an injunction against the Railroad Commission of Texas.

2. Defendant denies that this defendant should be ordered to comply with Section IX of the ordinance or with plaintiff's construction thereof, or at once or at any other time to place in effect in the City of Texarkana, Texas, the rates for gas in effect in the City of Texarkana, Arkansas; denies that the Court should require bond from this defendant.

3. Defendant denies that it should be ordered to file with the Clerk of the Court statement of moneys collected or statement as alleged in the third section of plaintiff's prayer; or to pay any amount into the registry of the Court; denies plaintiff is entitled to any of the relief sought.

III

In additional answer to plaintiff's supplemental bill, defendant states:

That from the last of June, 1930 to December 1, 1933 defendant collected in Texarkana, Texas only the rates prescribed by the City Council of Texarkana, Texas in Section V of the ordinance of June 13, 1930; and from December [fol. 143] 1, 1933 to date defendant has collected in Texarkana, Texas only the rates prescribed in said Section V. Defendant denies that it has failed to follow said Section V; but states it has followed and applied Section V completely and exclusively. On the other hand, defendant in Texarkana, Arkansas in the period from the last of June, 1930 to December 1, 1933, in view of what was done, collected in Texarkana, Arkansas only the rates that were prescribed by the City Council of Texarkana, Arkansas, and that were enacted by the City Council of Texarkana, Arkansas on May 3, 1923 and that were held to be the only legal and lawful rates in said City, copy of said ordinance being hereto attached and marked Exhibit "B," and made part hereof by reference.

Defendant denies that during the period from December 1, 1933 to February 16, 1934, or at any other period, it has supplied gas to its consumers in Texarkana, Arkansas under the rates described and set forth in the asserted franchise agreement of March, 1923, copy of which is attached as Exhibit "A" to plaintiff's original bill. The

rates collected in Texarkana, Arkansas in the period December 1, 1933 to February 16, 1934 were those prescribed for said city by the City Council of Texarkana, Arkansas as enacted in said ordinance of said City Council of Texarkana, Arkansas. No one has ever enforced or attempted to enforce collection of Texas rates in Arkansas.

Defendant states that that part of the Arkansas decree of December 4, 1936 adjudging recovery by the consumers [fol. 144] in Texarkana, Arkansas for the period of February 16, 1934 to December 4, 1936 was and now remains superseded and suspended by appeal and supersedeas bonds. The rates collected in Texarkana, Arkansas during said period are described infra; see Section IV hereof, sub-division A, paragraph (2) (y).

Defendant denies that beginning with December 4, 1936 it has been collecting from its consumers in Texarkana, Arkansas at the rates described in the asserted franchise of March 13, 1923 of Texarkana, Texas; states that in said period it collected in Texarkana, Arkansas the rates prescribed by the City Council of Texarkana, Arkansas originally enacted by said City Council of Texarkana, Arkansas in 1923. Defendant admits that during said period in Texarkana, Texas defendant has collected only the rates prescribed in Section V of the ordinance of June 13, 1930 enacted by the City Council of Texarkana, Texas.

1. Defendant denies that plaintiff is entitled to a decree ordering any refund from defendant on account of amounts collected in Texarkana, Texas during the period from June, 1930 to February 16, 1934; defendant collected during said period only the prescribed rates.

2. Defendant denies plaintiff is entitled to a decree ordering defendant to now charge and collect in the City of Texarkana, Texas no greater rates than those provided in a previous asserted franchise of March 13, 1923 which was superseded by the ordinance of June 13, 1930 and no longer [fol. 145] effective or operative. Defendant alleges that said ordinances speak for themselves. Defendant denies that the Texas rates of March 13, 1923 were put into effect in Texarkana, Arkansas on December 4, 1936 or at any other time. Defendant denies plaintiff is entitled to an order of refund in a similar manner, or in any manner, of any amount or amounts collected from consumers in Tex-

arkana, Texas since December 4, 1936 over and above the amounts which would have been due under the Arkansas rates which were held to be effective in Texarkana, Arkansas on December 4, 1936, but which holding is under appeal perfected in the last few days.

3. Defendant denies plaintiff is entitled to an order that defendant deposit any amounts for the period from February 16, 1934 to December 4, 1936; denies that if the decree of December 4, 1936 of the Arkansas court should be affirmed, any amounts should be paid to consumers in Texarkana, Texas.

Defendant denies that plaintiff in any capacity is entitled to:

(1) An order that defendant comply with Section IX of the ordinance of June 1930 nor with plaintiff's construction thereof; nor to an order that defendant

"place in effect in Texarkana, Texas the rates for gas which it is now collecting in Texarkana, Arkansas."

Moreover said rates are still under contest and appealed. The decision of the lower court is subject to reversal.

[fol. 146] (2) Defendant denies plaintiff is entitled to an order that defendant file any statement, or a statement showing as to each consumer the moneys collected under the prescribed rates of the ordinance of June 13, 1930 for any period, nor showing the amounts that would have been due if previous or superseded rates, or Arkansas rates had applied; denies that defendant should furnish statement as to any period or as to the period from June 13, 1930 to February 16, 1934, nor as to the period from February 16, 1934 to December 4, 1936, nor as to the period from December 4, 1936 to date of decree herein.

(3) Defendant denies it should be ordered to pay any amounts into the registry of the Court collected under the prescribed rates in excess of what would have been collected if the asserted rates of March 13, 1930, or other rates had been the prescribed rates; denies that offsets, set-offs and counterclaims, be disregarded; denies defendant should pay fees, costs, or commissions; denies plaintiff and the consum-

ers be afforded access to defendant's books for such purposes.

(4) Defendant denies that any amounts should be deposited or paid out for any period or for the period from June 1930 to February 16, 1934, or for the period from December 4, 1936 to date of decree herein.

(5) Defendant denies that the alleged amount of alleged excess collected from February 16, 1934 to December 4, 1936 be paid into the registry of the court, or be paid by defendant in any manner.

[fol. 147] Section IX, if it should be held to be valid and binding at all, or capable of application, should be limited to such period that should be held applicable, if any. Defendant says no such time has arrived, but if it should be held to be so, no retroactive effect should be applied. Nor could the period go back of December 1, 1933 nor extend later than February 16, 1934, or longer than two and one-half months. Section IX cannot by its terms have any retroactive effect; nor can it have effect in the future nor as to periods in contest.

The decree of December 1, 1933 in the United States District Court for the Western District of Arkansas established that the rate in Texarkana, Arkansas passed in 1930 was never a legal or lawful rate and ordered defendant to charge only the legal or lawful rates until lawfully changed. This did not amount to a lowering of the rates as they were never legally changed. However, these legal rates were less than the rates prescribed in Section V of the ordinance of June 13, 1930, which were the only rates charged in Texarkana, Texas. On February 16, 1934 a temporary injunction rate in Texarkana, Arkansas, higher than the Section V rates in Texarkana, Texas was put into effect, by order of the United States District Court for the Western District of Arkansas in Cause No. 219 in Equity. Decree was rendered by said court making the injunction permanent in part only and as modified, was appealed from, as shown *infra*.

Said injunction of February 16, 1934 is still effective in part, having been modified on December 4, 1936. Defendant [fol. 148] is resisting with all its power the modified or unfavorable parts of said decree and is insisting on its right to the full relief prayed, as originally granted in the tem-

porary injunction. Such cause pending in the United States District Court for the Western District of Arkansas, No. 219 in Equity, is now under appeal. It is in no sense a final judgment and may not be invoked for the benefit of plaintiff under Section IX of defendant's franchise. The rates now being charged in Texarkana, Arkansas are in no sense a voluntary rate; nor is it a rate which defendant has been finally compelled to charge.

Defendant, to all plaintiff's pleadings, states that plaintiff is undertaking to go back seven (7) years to upset rates prescribed on June 13, 1930; that an immense amount of money would be involved if plaintiff should be entitled to recover what is claimed; that the amount could not be determined without complex accountings as to each consumer; defendant estimates it would total probably more than \$150,000.00; that if any recovery were had, defendant would have offsets against numerous consumers; that an account would have to be stated as to each; that it would be necessary first for the court to hear this case in any event and make findings of fact and conclusions of law as to the issues raised herein, both of fact and of law; then to have accountings as to all concerned; that it will be necessary to state the accounts before a decree could be rendered herein, that defendant has numerous amounts owing to it from the consumers in the way of bills, merchandise, appliances, gas [fol. 149] ice boxes, heaters, stoves, pipings, etc., which defendant would be entitled to offset in case of any recovery herein.

Defendant further pleads all applicable statutes of limitation; the two year statute, the four year statute, and the five year statute.

IV

Sections VIII-A and IX

Defendant denies it is estopped from asserting the invalidity of Section VIII-A and Section IX of the franchise ordinance. Defendant alleges that to obtain rates which will cover its operating expenses, depreciation requirements and give it a fair return, is its duty both to the investing public and holders of its securities and to the stockholders and gas consumers.

A. Section IX Invalid and Inapplicable

(1) Defendant states that Article E of the ordinance of March 13, 1923 is invalid; and has not been in force at any time since June, 1930. It was superseded by Section V of the ordinance of June 13, 1930. Article E, if it could be considered, is and would be invalid for the same reasons as those herein set out in relation to Section IX of the ordinance of June 13, 1930.

(2) Defendant states that Section IX of the ordinance of June 13, 1930, is invalid and inapplicable because:

[fol. 150] (a) It conflicts with Section V of said ordinance;

(b) It conflicts with the laws and Constitution of Texas, particularly Article 1124 Revised Civil Statutes 1925, and Article I, Section 17, and Article XII, Sections 3 and 4 of the Constitution of Texas;

(c) If it should be conceded that rates could be controlled by binding contract, there would, in view of the laws and constitution of the state, be such an inevitable conflict between that binding provision and the dominant power to regulate as to render the contract inoperative and, therefore, to cause it to perish from the mere fact of admitting its conflict with the power to regulate.

(d) The duty of the owner of property used for public service to charge only a reasonable rate and thus respect the authority of the government to regulate in the public interest, and of the government to regulate by fixing such a reasonable rate as will safeguard the rights of private ownership, are interdependent and reciprocal.

(e) It undertakes to deprive the City Council of Texarkana, Texas, of its lawful and sole jurisdiction;

(f) It undertakes to delegate to and vest in extraterritorial authorities and bodies outside of the State of Texas, the non-delegable power to regulate or fix rates within the State of Texas;

(g) It is ultra-vires the Council; and without sanction of the charter or the laws governing the city;

[fol. 151] (h) It undertakes to change and modify rates upon a contingency, or future event, in violation of the con-

stitution, statutes, laws and rules of Texas, which provide that rates may be changed only after notice and hearing and only if the facts justify;

(i) Section IX undertakes to provide that if defendant should be compelled to place into effect any rates in Texarkana, Arkansas, less than the rates prescribed in Texarkana, Texas, then the lessened rate in said City in Arkansas shall apply in Texarkana, Texas, and defendant shall not be authorized to charge any higher rate, (1) regardless of Texas laws and Constitution (2) regardless of the fact that said rates would be confiscatory of defendant's property and cause it daily loss;

(j) Section IX is inapplicable because the decree of December 1, 1933 of the Court in Arkansas was not based on, and the Court did not undertake to consider the merits of the rate;

(k) Section IX is inapplicable because the rates in Arkansas were not legally or lawfully changed at any time after May 8, 1923;

(l) Section IX is invalid because it undertakes to abrogate prescribed rates;

(m) The City Council of Texarkana, Texas, by the statutes of Texas and particularly Article 1124 Revised Civil Statutes, and the city's charter, is charged with the inalienable duty of functioning as a rate regulatory body; it may [fol. 152] not by contract or otherwise suspend, surrender, abridge or put in abeyance its ever-present duty to regulate rates according to law when called upon or illegally vary the rates that are prescribed by it;

(n) The City may not under any circumstances bind itself by contract as to rates;

(o) Defendant is itself without power to contract as to rates;

(p) Even if the City had power to contract as to rates, the contract will fall when as here it conflicts with the exercise of the rate making duty, the duty to regulate being supreme;

(q) The variation of rates dependent on action in another city amounts to an illegal delegation of the regulatory

power. Particularly is this true here where the attempted delegation is to a city in another state, having an entirely different regulatory system;

(r) The laws of the State of Texas do not authorize and never authorized the fixing of a conditional rate, or of a rate to take effect in the present subject to being revoked and abrogated by the happenings of some event attached to such a rate as a condition subsequent;

(s) Section IX must yield as the effect of its enforcement would be to cause confiscation of defendant's property and business;

(t) It is too vague, obscure and uncertain to be applicable or enforceable; its meaning is not susceptible of ascertainment;

[fol. 153] (u) If it could be applicable or enforceable as to any period of time, it is too vague and uncertain as to other periods of time;

(v) Asserted discrimination cannot make Section IX valid or enforceable.

(w) Section IX is invalid because it would violate the Sections of the special charter providing that the City Council shall not prescribe any rate which will yield less than ten per cent per annum on the actual costs of the property, as amended by Article 1124 Revised Civil Statutes of 1925, requiring the rates to be based on the fair value of the property; rates are not authorized to be based on rates in another city;

(x) It is unlawful and impracticable to make the rates in Texarkana, Texas follow the course of the rates in Texarkana, Arkansas; taxes and expenses in the different states and cities being different; having different ad valorem, occupation and license taxes; insurance rates; workmen's compensation; paving cutting requirements; different physical properties; values and quality of pipe; public liability rates; litigation and rate case expense; damages, accidents; lost and unaccounted for gas; density of population; difference in soil conditions; and depreciation requirements, etc.;

(y) Because Section IX is incapable of any reasonable application. Plaintiff in its brief at p. 5 says:

"So far as the rights of the consumers in Texarkana, are [fol. 154] concerned, the court cannot now pass upon them from and after February 16, 1934. If the gas company is successful in its Arkansas suit, then there will have been no discrimination from and after February 16, 1934."

The reason for this statement is that from February 16, 1934 to December 4, 1936, the rates in Texarkana, Arkansas were higher than the rates charged in Texarkana, Texas. If defendant is successful on appeal to the U. S. Circuit Court of Appeals in the Arkansas suit, defendant will charge higher rates in Arkansas than the prescribed rates in Texas. The rates charged in Texarkana, Arkansas from February 16, 1934 to December 4, 1936 were:

\$1.75 for the first 1,000 cu. ft. of gas,
 \$.75 each for the next 2,000 cu. ft.,
 \$.55 each for the next 7,000 cu. ft.,
 \$.35 each for each additional 1,000 cu. ft.

From the statement of plaintiff above quoted, that "the Court cannot now pass upon" the rates in Texarkana, Texas, "from and after February 16, 1934," and the statement that, "If the gas company is successful in Arkansas suit, then there will have been no discrimination from and after February 16, 1934," it would follow there would be, in Texarkana, Texas, from February 16, 1934 until some time in future, a hiatus in which no one would be able to say what have been the applicable gas rates in Texarkana, Texas since February 16, 1934. The ground offered by the plaintiff for the existence of such queer condition is that [fol. 155] Texas rates are dependent upon the success or failure of defendant in the Arkansas suit. Such supposed impossibility, of determining, by any means within or without the State of Texas, what are the legal rates in Texarkana, Texas illustrates the principle, that the City cannot delegate or surrender the regulatory power; that, where a power is granted and the method of its exercise prescribed, that method excludes all others and must be followed. If defendant shall be required to make reparations as to dates prior to February 16, 1934 it would necessarily be on the ground that prior to February 16, 1934, the 1923 Arkansas rate became applicable in Texarkana, Texas, and not the rate prescribed by the City Council of Texarkana, Texas in Section V of the ordinance of June 13, 1930.

If reparation or reduction should be required since February 16, 1934, or if defendant should be required to reduce its rates in Texarkana, Texas, and if defendant should be successful in the appeal in the Arkansas suit, the prescribed rates in Texarkana, Texas would become again operative and judgment would have to be rendered against the gas consumers in Texarkana, Texas in favor of defendant.

If defendant should be required to reduce its rates in Texarkana, Texas below the prescribed rates, and if the rates in force in Arkansas from February 16, 1934 to December 4, 1936 should be upheld in the Arkansas appeal, the rate in Texas would of and from said date be increased to [fol. 156] those prescribed in Section V of the ordinance of 1930 automatically and retroactively, and without action by the City Council of Texarkana, Texas.

On the other hand, if defendant should lose the appeal in Arkansas, the rates prescribed in 1930 in Texarkana, Texas would under the claim of said City, have had no operative force even for one instant. If reparation should be ordered, it would mean that defendant would have to pay out the difference between the revenues collected under the rates prescribed by the City Council of Texarkana, Texas and the calculated revenues that would result from applying the Arkansas rates of 1923 to the gas consumed in Texas; and that defendant adopt Arkansas rates in Texas, though under appeal and though conflicting with the prescribed rates.

Section IX conflicts with and, if valid, would operate to change the laws of Texas, to deprive the Council of its jurisdiction, to unlawfully abrogate prescribed rates, to delegate and vest in extra-territorial authorities and bodies outside the State of Texas, the non-delegable police or rate power. Moreover, the rates would vary upon contingencies.

(z) Because of the grounds set forth as to Section VIII-A, *infra*.

(3) Section IX, even if valid, is not applicable to the situation in the case at bar:

(a) It is not applicable to the period from June 1930 to December 1, 1933, it is not retroactive.

[fol. 157] (b) Section IX is not applicable to the period subsequent to November 23, 1933; defendant from and after

said date had the right to charge reasonable rates without being limited to the prescribed rates of Section V of the ordinance of June 13, 1930, or to the rates prescribed in 1923, or to any lower rates than those applied for in the City Council on November 3, 1933; defendant exhausted all legislative remedies open to it and under the circumstances plaintiff has no right to enforce confiscatory rates.

(c) As to the period from December 1, 1933 to February 16, 1934, Section IX is inapplicable; the rates in Texarkana, Texas were under contest; and the rates in Texarkana, Arkansas were in contest.

(d) As to the period from February 16, 1934 to December 4, 1936, Section IX is inapplicable; the rates in Texarkana, Arkansas were higher during said period, and are involved in the appeal to the United States Circuit Court of Appeals for the Eighth Circuit. Supersedeas was granted in Texarkana, Arkansas against any refunds during that period.

(e) Section IX is inapplicable to the period from December 4, 1936 to any subsequent times; the rates in Texarkana, Arkansas in said period are under contest and are involved in the appeal to the United States Circuit Court of Appeals for the Eighth Circuit.

(f) Section IX is inapplicable to any period since November 4, 1934; on November 4, 1933 defendant gave one-[fol. 158] year's notice of application for increased rates over the rates that were applied for under the application filed by defendant on November 3, 1933 then pending for an immediate increase in rates on which defendant was requesting and seeking prompt hearing and action.

(g) Section IX is inapplicable to period of time since January 23, 1935; plaintiff itself on January 23, 1934 gave notice that it would on January 23, 1935 enter upon hearings for change and modifications of rates.

B. Section VIII-A. Invalid and Inapplicable

(1) In its brief filed in this court plaintiff states:

"In the statement of issues, immediately preceding this outline of the argument, two matters raised in the answer are described which will not be argued. They are:

A. The matter of the company's agreement that it must give one year's notice before applying for an increase in rates. This is not argued because it is now moot.

B. The matter of the now pending suit in Arkansas. This is not argued because the present suit in Arkansas is a wholly separate proceeding from the litigation which resulted in the decree of December 1, 1933, compelling the gas company to lower its rates and make refunds " * * " (p. 20).

(2) Defendant, after the procedure it has taken, is entitled to proceed in the counter-claims to enjoin the pre-[fol. 159] scribed rates. Section VIII-A, if it should be held to be valid, gives defendant the right to apply for increased rates after one-year notice, and recognizes the right of defendant to increase its rates after one-year notice, which notice was given on November 4, 1933, as admitted by plaintiff. More than three years have since expired. The plaintiff has so far prevented defendant's efforts to secure reasonable rates.

(3) Defendant states that even if Section VIII-A of the franchise agreement could be assumed to be valid, the Council has waived Section VIII-A by its actions in calling upon defendant to go through a complete rate case, and in having a full hearing and on the merits acting upon defendant's application, etc., consuming great time, effort and expense of defendant, and in holding itself out as willing to consider the matter upon its merits and in considering the matter on its merits. Such actions of the city council on its merits were reviewable by the Railroad Commission.

(4) Defendant states that the power of rate regulation cannot be suspended or held in abeyance; that rates cannot be contracted by any binding provisions; that after notice and hearing rates are subject at all times to change if the facts justify; under the regulatory powers of the state, said Section VIII-A is invalid; said section attempts to make binding provisions as to rates suspending and holding in abeyance the governmental power of the state and its sub-[fol. 160] divisions; such power is subject to exertion at any time; governmental power of regulation of rates cannot be suspended for any definite and certain period of time. Rates, however fixed and prescribed, whether in a franchise

or contract or in an order of a regulatory body, are subject to change at any time thereafter, either upon the initiation of the city or upon the application of the defendant.

(5) Said Section VIII-A, since it is not binding upon plaintiff, is unilateral and cannot bind defendant for want of mutuality.

(6) Defendant had the right on November 23, 1933, to place into effect the schedule of rates it had filed with the city council. This right is grounded in the fact that the franchise rates were and are and will continue to be daily confiscatory of defendant's property, resulting in daily loss as herein shown.

(7) Defendant pleads that plaintiff has no cause of action to prevent defendant from pursuing the procedure to increase the prescribed rates, nor to enjoin defendant's appeal to the Railroad Commission and never had such a cause of action, but the effect of what it did blocked the procedure. Plaintiff alleges that statutes of Texas

"provide that pending the hearing before the city council said increased rates should not be placed into effect, and in the event of an appeal, they should not be placed in effect until the appeal should be passed upon by the Railroad Commission."

[fol. 161] (8) Defendant reiterates the allegations made in its application of November 3, 1933, filed in the city council, copy of which is attached to defendant's pleadings, and reiterates the allegations in its motion and affidavits filed November 9, 1933, copy being hereto attached as Exhibit "A," and made a part hereof.

(9) Defendant has done all it could to get relief without avail, and has and will have no remedy for what it has daily lost and continues to lose unless this Court takes jurisdiction and dissolves the temporary injunction.

(10) Article 6058 of Revised Civil Statutes of Texas, of 1925, is construed by the decisions of Texas to provide that, where the utility seeks to increase existing rates, the increase cannot be put into effect with or without bond until the commission makes its final order on appeal from refusal of the council to allow the increase. Without notice or hearing, the

Railroad Commission of Texas refused to act on defendant's application for a temporary order superseding the existing rates, pending final hearing. The Railroad Commission of Texas has jurisdiction of the appeal from the order of the council dated January 23, 1934, refusing to grant defendant's application of November 3, 1933, but refuses to recognize or act upon the appeal at all unless defendant complies with a provision for a certain bond relating solely to the Resolution of December 12, 1933, which the Commission may not legally require.

[fol. 162] The Statute of Texas is construed to require that the existing rates continue in statu quo and be not increased until final disposition of the case before the Commission, does not afford an adequate remedy; is invalid as so construed by the courts of Texas; is violative of the due process and equal protection of law clauses of the Fourteenth Amendment to the United States Constitution; requires enforcement of rates that are daily confiscatory until such time as the Commission makes final disposition which may take from a few months to many months; in the case at bar it is taking years. Defendant alleges that on such appeal the Railroad Commission, unless it can grant supersedeas, is required by law to hear such appeal without requiring the posting of supersedeas bond; and the action of the Railroad Commission in refusing to proceed to hearing is erroneous and contrary to law and deprives defendant of the hearing it is entitled to from said Railroad Commission and of substantial rights. Under such circumstances defendant has the right to maintain its action to charge the rates it applied for in the city council or to fix its own rates, to prevent daily confiscation of its property; defendant asks that the Court sustain this right. Defendant has taken all the steps open to it under the Texas statutes as far as it could.

(11) Section VIII-A is invalid and inapplicable for the same reasons as Section IX as herein alleged.

[fol. 163]

V.

Special Charter Provisions and Regulatory Statutes

Defendant pleads that the city charter contains the following provisions which are the only ones relevant to this case:

Sec. 33. Council —. Ordinance —. Title —. The style, title and caption of all ordinances shall be "Be it ordained

by the City Council of the City of Texarkana, Texas," but the same may be omitted from ordinances published in book or pamphlet form.

Sec. 34. Council — Ordinance Committee —. All ordinances when introduced before the council, except in cases of emergency, shall be referred to an ordinance committee, to be appointed by the council, and such ordinance introduced may be printed for the use of the members of the council, but no ordinance shall be so changed or amended as to change its original purpose.

All ordinances referred to said committee shall be reported back to the council at its next regular meeting, unless otherwise ordered by the council, with the report of said committee thereon annexed thereto.

Sec. 35. Ordinance — Reading —. No ordinance shall be passed, except in case of emergency, until the same shall have been read in full in two several meetings of the city council.

Sec. 36. Ordinance — Passage —. No ordinance shall be passed upon the day it is introduced before the council [fol. 164] for the first time, except in cases of emergency, and in all cases of emergency the council shall have the power to pass such ordinances as may be deemed necessary under the emergency clause, without referring same to the ordinance committee upon request of the mayor and the vote of the three-fifths of all the aldermen present.

Sec. 37. Ordinance — Ayes — Nays —. The ayes and nays shall be taken upon the final passage of all ordinances or resolutions, and entered upon the minutes of the council by the city secretary, and every ordinance or resolution shall require for its passage an affirmative vote of a majority of all the aldermen elected, except on ordinances or resolutions granting franchises or levying taxes, in either of which events it shall require for the passage of such ordinance or resolution an affirmative vote of three-fifths of all the members elected to the city council.

Sec. 160. Franchise — Vote —. The rights of the City of Texarkana in the use of the public streets, alleys, squares, parks, bridges and all public places are hereby declared to be inalienable to any person, firm or corporation, except by license permit and franchise passed by the city council on

the affirmative vote of three-fifths of all the members of said council elected.

Sec. 161. Term —. No franchise, lease or permit to the use of the streets, alleys, squares, parks, bridges or other public places or the use of either or any of them shall be [fol. 165] made by the city council for a longer term than twenty-five years.

Sec. 162. Ordinance —. Publication —. Before any grant of franchise shall be made by the council, the terms thereof embodied in the form of an ordinance, as agreed to by the applicant and the council, shall be published in full, for one week next before the date of its passage, in the official newspaper of the said city, and publication to be paid for by the applicant.

Sec. 163. Terms —. Said proposed franchise shall contain all the terms and agreements between the parties thereto, and it must expressly set forth that the council shall have the right and privilege of regulating and controlling the operation of all business done thereunder, fixing fares, rates, tolls and charges and inspecting the business and work from time to time as it progresses, and rate regulations shall conform to Section 197 of this charter.

Sec. 163a. Terms —. In the event that any franchise or permit is so given by said council, which shall not contain such stipulations therein as provided for in Section 162 of this charter, then it shall, nevertheless, be considered that all of the said stipulations contained in said Sections 162, 163 and 197 are part and parcel of the said contract and franchise, just as though written therein, and the said applicant so accepting such franchise, as well as their heirs, assigns and successors, shall be held and firmly bound [fol. 166] thereto, notwithstanding such omissions. As amended by 31st Leg., passed under emergency clause.

Sec. 164. Readings —. Three Meetings —. No franchise shall be granted under the emergency clause and none shall be granted until after due publication and after being read in full in three several meetings of the city council, and any franchise granted hereunder, which is not in accordance with the provisions of this section, shall be subject to be set aside by any person interested in a suit for that purpose.

Sec. 196. That the city council shall have the power to regulate by ordinance the rates and compensation to be charged by all water, gas, light and telephone companies, corporations or persons using the streets and public grounds of said city and engaged in furnishing water, gas, light and telephone service to the public, and to prescribe reasonable rules and regulations under which such commodities shall be furnished and services rendered, and to fix penalties to enforce such charges, rules and regulations; provided, that the city council shall not prescribe any rate or compensation which will yield less than ten per cent per annum net on the actual costs of the physical properties, equipments and betterments. Said city council may also fix the charges which may be collected for transporting passengers and baggage in vehicles engaged in public service.

[fol. 167] Article 1124, Rev. Civ. Statutes

Article 1124 Rev. Civil Statutes of Texas of 1925 is as follows:

Any city having a special charter or a charter adopted or amended under the provisions of chapter 13 of this title, and having authority under its charter to determine, fix and regulate the charges, fares or rates of compensation to be charged by any person, firm or corporation enjoying a franchise in said city, shall in determining, fixing and regulating such charges, fares or rates of compensation, base the same upon the fair value of the property of such person, firm or corporation devoted to furnishing service to such city, or the inhabitants thereof, and not upon any stocks or bonds issued or authorized to be issued, by, or any other indebtedness of, such person, firm or corporation. No city shall be responsible, for, concerned with, authorize, approve or have jurisdiction over, the issuance or sale of any stocks or bonds by any such person, firm or corporation, but the issuance and sale thereof shall be governed solely by the Constitution and laws of this State applicable thereto. (Acts 1st C. S. 1921, p. 152.)

The Constitution of State of Texas

The Constitution of State of Texas provides in Article I, Section 17 as follows:

Section 17. No person's property shall be taken, damaged or destroyed for or applied to public use without adequate

compensation being made, unless by the consent of such [fol. 168] person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof.

And Sections 3 and 4 of Article XII of Constitution of State of Texas provides as follows:

Section 3. The right to authorize and regulate freights, tolls, wharfage or fares levied and collected or proposed to be levied and collected by individuals, companies or corporations for the use of highways, landings, wharves, bridges and ferries, devoted to public use, has never been and shall never be relinquished or abandoned by the State, but shall always be under Legislative control and depend upon Legislative authority.

Section 4. The first Legislature assembled after the adoption of this Constitution shall provide a mode of procedure by the Attorney General and District or County Attorneys in the name and behalf of the State to prevent and punish the demanding and receiving or collection of any and all charges, as freight, wharfage, fares, or tolls, for the use of property devoted to the public, unless the same shall have been specially authorized by law.

VI

(a) Defendant in the first of the year 1930 made application to the City Council of Texarkana, Texas, for change [fol. 169] and modification of rates for gas distribution in the City of Texarkana, Texas. The rates prescribed by the City Council of Texarkana, Texas, on March 13, 1923 were in effect at that time. Hearings were held from time to time on defendant's application; voluminous testimony and exhibits were introduced in the Council, the principal witness being Victor A. Dorsey of Victor A. Dorsey & Company, an engineering firm of Chicago, Illinois of national repute. The city council after hearing denied the application and refused to change the existing rates. Appeal was taken by defendant to the Texas Railroad Commission

where full hearings were had, voluminous testimony and exhibits being introduced. During the progress of the hearings in the Railroad Commission, a new schedule of rates was proposed by plaintiff. Whereupon proceedings were re-opened in the city council; new rates were prescribed; a new franchise was issued by ordinance dated June 13, 1930. The Railroad Commission approved the new rates and dismissed appeal from the prior action of the city council.

The rates prescribed by the city council in the ordinance of June 13, 1930 were put into effect and have been charged at all times since in Texarkana, Texas. Said rates are set forth in Section V of said ordinance reading in part as follows:

Section V

"Section V. A hearing as to the rates which shall be charged by the Grantee having been had, and the Grantee [fol. 170] having waived any right to notice of the fixing of such rates, the rates to be charged by the Grantee for natural gas furnished under the provisions of this Ordinance are hereby determined and fixed by compromise agreement, said rates are as follows, to wit:

Domestic and Commercial Rate

(a) For the first one thousand (1000) cubic feet per meter of gas or fraction thereof sold to any domestic or commercial consumer during any one month—\$1.00 per thousand cubic feet. Said charge shall also be made regardless of whether any gas is consumed or not.

(b) For the next one hundred and forty-nine thousand (149,000) cubic feet of gas or fraction thereof sold to any domestic or commercial consumer during any one calendar Month—\$.50 per thousand cubic feet. All gas sold at \$.50 per thousand cubic feet is subject to 5% discount if paid within ten (10) days after bill is rendered."

Such prescribed rates thereupon became the only lawful or legal rates in Texarkana, Texas except as defendant secured the right to charge increased rates by exhausting the remedies and showing inadequacy and failure to produce a fair return.

(b) More than three years later defendant on November 3, 1933 applied to the City Council of the City of Texarkana,

Texas for a change in rates by written application and notice, copy of which is attached as Exhibit "C" to plain-[fol. 171] tiff's petition and made part hereof by reference. Defendant, as stated in said application, was and is suffering current losses amounting to \$350.00 per day; and confiscation of its property was and is taking place; and will continue to take place unless the Section V rates are increased.

Defendant on November 4, 1933 filed with the City Council of Texarkana, Texas, notice reading as follows:

"To the Honorable Mayor and Members of the City Council of the City of Texarkana, Texas:

You are hereby notified pursuant to the terms of a certain franchise, dated June 13, 1930, that the grantee therein, Southern Cities Distributing Company, will apply for an increase in rates one year after date of giving this notice.

This notice contemplates an application for an increase in rates over such rates as have been applied for pursuant to the application of said grantee, Southern Cities Distributing Company, now pending, for an immediate increase in rates upon which Southern Cities Distributing Company is requesting and will seek prompt hearing and action.

Southern Cities Distributing Company, by Paul McBride, General Manager.

Filed: G. D. Garrett, City Sec. Nov. 4, 1933."

Defendant on November 9, 1933 filed motion for prompt hearing and affidavits and requested that the city council proceed to hearing, calling attention to the fact that no remedy existed for recovery of the day to day losses which [fol. 172] were then taking place; copy of the motion and affidavits being hereto attached, marked Exhibit "A," and made part hereof; and the statements therein made are here re-affirmed as though fully copied at this point.

The city council on November 10, 1933 passes a resolution directing the city attorney to use all available means in law and in equity that might be necessary to prevent any increase in rates until such time as the council might deem that a change in rates should be justified.

(c) Defendant on November 14, 1933 was present in the Council by its attorneys with witnesses, and requested permission to introduce its evidence. The council refused to hear defendant; but propounded a questionnaire calling

for numerous facts pertinent to the issue whether defendant was entitled to an increase in rates, and passed:

"A Resolution calling on Southern Cities Distributing Company for Information Needed by the Council in Connection with said Company's Application for New Rates and Ordering said Company Not to Put into Effect the Proposed Rates Shown in the Notice and Application filed with the City Secretary on November 3, 1933."

The Resolution referred to defendant's application and motion for prompt hearing asking the council to pass upon that part of the application for prompt preliminary relief; referred to Section VIII-A of the ordinance of June 13, [fol. 173] 1930; and stated that there were no provisions in the Statutes of the State of Texas which would authorize the council to place new and increased rates into immediate effect and that

"The Council is willing, if proper information is submitted to it, but without waiving any of its rights under said franchise ordinance above described and without waiving any of its rights or any of the rights of the consumers under the laws, general and special, of the State of Texas, to consider the question whether it would waive said provisions of said franchise."

And the Resolution called upon defendant for voluminous information and detailed evidence as to defendant and the pipe line systems and as to all matters relating to the fixing of rates; and recited that the council:

"* * * does order and require that before the Council will proceed with the hearing on the application heretofore filed with it, said information shall be furnished in writing, in duplicate and under oath, the Council finding that it is necessary that it have knowledge of the facts hereinafter set forth in order to enable it to pass upon said application and to perform its duties to the gas consumers in said city, said information so required being follows:" (here follow detailed and voluminous questionnaire and interrogatories going into great detail.)

[fol. 174] This resolution in Section II referred to important factors in fixing the rates and in determining the question whether defendant was losing money in its plant

in Texarkana, Texas, and recites that "The Council cannot pass upon the question * * * without the information hereinbefore called for.

The Resolution in Section III ordered defendant "not to put the proposed new rates into effect pending a hearing and decision upon its application," and postponed a hearing until the information should be furnished; provided in Section IV that the council would pass on objections to any of the questions on November 28, 1933; provided in Section V that "as soon as the Southern Cities Distributing Company informs the Council when it can and will furnish the information herein called for, the Council will take up the question of setting its application for final hearing."

(d) Plaintiff on November 16, 1933 filed Petition in the District Court of Bowie County, Texas (being Case No. 106 In Equity now in this Court), to enjoin defendant from increasing its rates in Texarkana, Texas, alleging that defendant was not entitled to apply for an increase in rates, except upon a year's notice under Section VIII-A of the Ordinance of June 13, 1930, and that defendant was bound: "to supply gas under the rates granted and established therein,"

[fol. 175] and that:

"Said portion of said franchise granting such rates is contained in Section V of said ordinance."

Temporary restraining order was sought immediately on the filing of said suit and was obtained on the same day, without notice to or knowledge of defendant, and without a hearing, restraining defendant, as prayed, which was to prevent defendant from putting into effect on November 23, 1933, or at any other time or in any other manner except as provided in the franchise, rates not in conformity with the terms of said ordinance, reference being made to the record for certainty as to the terms of said injunction. This suit was in due course of time removed to the Federal Court, in which answer and counterclaim on December 20, 1933, was filed by defendant. Plaintiff on January 15, 1934, filed amended and substituted petition to include other subjects and defendant on May 9, 1934, filed amended and substituted answer and counterclaim. Defendant states that such pleadings cover the entire situation except that plain-

tiff pleads subsequent litigation in the State of Arkansas; that all such pleadings were filed before the Johnson Act, Title 28 U. S. C., Section 41 as amended May 14, 1934, C 283, par 1, 48 Stat. 775; that the Johnson Act does not affect pending suits (Idem par 2) that the Johnson Act is on that and on other grounds totally inapplicable to defendant's counterclaims; that the jurisdiction of this Court has been enlarged by the Federal Declaratory Judgment [fol. 176] Act of June 14, 1934 (Sec. 400, Title 28 U. S. C.). The counterclaims are substantially the same as the answers to plaintiff's petitions. Defendant, under the first part of Equity Rule 30, is under mandatory necessity of setting up its counterclaims. A fortiori, the counterclaim are proper under the second or optional part of said Rule 30. It is necessary that the Court handle this case for all purposes and proceed to a final determination of all matters in issue.

(e) Defendant, though enjoined from increasing its rates by the injunction November 16, 1933, continued to prosecute with due diligence its application before the City Council of Texarkana, Texas, for an increase in rates; and the city council continued to hear said application. Defendant filed request that the questionnaire be amended in certain respects, and on November 28, 1933, appeared by its attorneys with witnesses. The city council passes a resolution amending the interrogatories and propounding additional interrogatories.

(f) The city council on December 12, 1933, in the absence of defendant, its attorneys, witnesses, or representatives and without notice to defendant and without hearing, passed a resolution which referred to a decree in a suit of Southern Cities Distributing Company vs. The City of Texarkana, [fol. 177] Arkansas, in the United States District Court for the Western District of Arkansas, dated December 1, 1933, discussed *infra*.

The resolution of December 12, 1933, referred to Section IX of the franchise of June 13, 1930, in Texarkana, Texas; and in Section I provided that defendant

“ * * * is now ordered and directed to comply with its franchise contract and agreement and to restore in the City of Texarkana, Texas, the rates for gas which were in effect in said city on and prior to the passage and acceptance of the franchise ordinance above described, to put such rates

into effect on all bills rendered by it to gas consumers on and after December 1, 1933, and to maintain such rates in effect until such time as they may be lawfully changed."

and in Section II that:

"The City Attorney is directed to call upon said company at once to make refunds to all its consumers in Texarkana, Texas of the difference between the amounts collected from them under said franchise since May 30, 1930, and the rates which have been found in said case to have been the lawful rates in the City of Texarkana, Arkansas, during said period and upon the basis of which refunds have been ordered to consumers in said city;"

and that in the event of refusal of defendant to make such refunds in Texarkana, Texas, the City Attorney was ordered "to file suit in the name of the city as the representative and for the benefit of the gas consumers in said city for recovery of said refunds." Copy of the resolution is [fol. 178] attached to plaintiff's original bill and is referred to for certainty as to terms.

The Resolution of December 12, 1933 is a nullity, invalid and of no force it was passed without notice to the defendant and without evidence or a hearing; it was passed in only one reading, the city charter requiring three separate readings on three separate meetings; because there was no publication as required by the city charter; there were failures in other points to comply with the city charter, such as the title, style and caption, emergency, non-reference to committee, no reporting back; passage on the same day of introduction; failure to record proper vote. The only action of the city council concerning a reduction of rates after notice and hearing is the Resolution of January 23, 1934 which gives notice that the city council would on January 23, 1935 enter into a hearing concerning the reduction of rates in Texarkana, Texas.

Regarding said Resolution of December 12, 1933 plaintiff in its brief states:

"The resolution of the Council shows on its face that it was taken in view of and to secure performance of the franchise agreement of the company, and was not taken under the powers conferred on the Council as a rate regulating tribunal."

"This was simply the action of one party to an agreement calling upon the other party to carry out its obligations and directing that suit be brought if such other party refused. [fol. 179] It does not purport to be the order of a rate regulating tribunal, made after formal notice and taking of testimony." (p. 24).

and,

"We know of no statute or decision which holds that where a gas company, or any other utility, makes an agreement with a city as to rates or any other matter, than that the City Council may not direct that company to carry out and perform its agreement, or may not direct that suit be brought to compel it to do so, without first giving the company formal notice and opportunity to be heard. The only question for decision was whether the City should insist on the performance of an obligation voluntarily entered into by the gas company. A mortgagor is not entitled to a hearing before the mortgagee calls on him to pay or before the mortgagee orders a foreclosure in the event of non-payment. The maker of a note to a bank is not entitled to formal notice and a hearing before the board of directors of the bank before the bank calls on him to pay or orders suit if he fails to pay" (p. 25).

Plaintiff quoting Article 6058 Revised Civil Statutes of 1925, states:

"All of this is a description of an appeal from an order of a regulatory tribunal. A resolution of a city council calling upon the company to carry out an agreement to reduce rates is not a *decision, regulation, ordinance or order* reducing rates. What the legislature evidently intended was to provide a review for the actions of the Council as a rate making tribunal, * * * not to subject its franchise [fol. 180] agreements to a review by the Commission" (p. 27, italics are the plaintiff's).

These admissions by plaintiff should not be permitted to prevent the court from holding said Resolution to be ineffective to reduce the gas rates as counterclaimed by the defendant, but should rather be taken as confession of defendant's counterclaim for affirmative order to such effect. Defendant, when appealing on March 5, 1934 from the Council's Order of January 23, 1934 denying increased rates,

out of caution took the necessary steps to appeal from said Resolution of December 12, 1933, if it were appealable. If said Resolution of December 12, 1933 had been legally passed and were a rate-reducing ordinance within the scope of Article 6058 Revised Civil Statutes of 1925, the petition of plaintiff insofar as based upon said Resolution would be premature. But defendant understands that plaintiff grounds its asserted reparation solely upon Section IX of the franchise ordinance of June 13, 1930 and upon alleged discrimination, and not upon said Resolution of December 12, 1933. Since the Resolution was illegally and improperly passed and since it is conceded not to be a rate-reducing ordinance, the Railroad Commission had no jurisdiction thereof, and the attempted appeal is non coram judice. The bond referred to by the Railroad Commission which pertains only to said resolution, is unauthorized for this and other reasons shown infra.

[fol. 181] (g) The City Council of Texarkana, Texas, continuing the hearing, on December 27, 1933 passed a resolution with reference to the time of the hearing of defendant's application, and on January 2, 1934 passed another resolution postponing the time of the hearing; defendant at all times pressing its application.

(h) On January 22 and 23, 1934, the City Council of Texarkana, Texas, held a full hearing at which plaintiff and defendant each were represented by attorneys; both plaintiff and defendant introducing voluminous evidence consisting of documentary and record evidence, testimony of experts, engineers, accountants, and other witnesses, covering all phases of a rate case.

The city council at the conclusion on January 23, 1934 passed a resolution stating that its resolution of November 4, 1933

"recited that it was willing, if proper information be submitted to it, but without waiving any of its rights under said franchise contract, to consider the question whether the provisions of said contract were oppressive or unjust and whether it should waive the same and calling upon said Southern Cities Distributing Company to furnish the proper information from which the Council could determine said question."

and that the city council

"having heard all the evidence, does hereby make the following findings with reference to the question as to whether [fol. 182] it should waive the provisions of said franchise agreement and consent to consider an application for increased rates without said one-year's notice and with reference to the propriety of the increased rates and charges proposed by the company." The findings of the City Council consist of 25 pages concluding:

(1) The Council refuses to waive and still insists upon the provision of one year's notice and orders the City Attorney "to pursue and insist upon his application now pending in the Courts for an injunction to secure a specific performance of said franchise agreement,"

(2) that the rates proposed by defendant "are unjust and unreasonable and are exhorbitant and improper rates and would result in an even greater and more unjust discrimination against the consumers of gas of Texarkana, Texas, than are the rates the company is now collecting in violation and in disregard of its franchise agreement to give the consumers in this city the benefit of any rates it is compelled to place in effect in Texarkana, Arkansas, and said Southern Cities Distributing Company is forbidden to put such proposed new rates into effect."

(3) "The City Attorney is ordered, and directed to continue and to insist upon his application now pending in the courts for an order directing said company to comply with its franchise agreement and to place in effect in Texarkana, Texas the rates it has been compelled to place in effect in Texarkana, Arkansas;" and

[fol. 183] (4) "notifies the company that one year after date it will enter into a hearing to determine whether the rate should not be reduced to 40¢ per m.c.f."

(i) Defendant on March 3, 1934, appealed its application to the Railroad Commission of Texas by filing petition with said Commission and praying that said Commission fix and approve the schedule filed by defendant. In this proceeding defendant appealed not only from the Resolution of January 23, 1934, but also out of caution from the Resolution of December 12, 1933 in case it should be considered appealable.

The City did all it could to prevent defendant proceeding with the appeal; on April 21, 1934, it filed in the Railroad Commission Motion to Dismiss the Appeal or, in the alternative, on account of the injunction and suit, that all further proceedings in the Commission be abated until such time as the litigation in the United States District Court for the Eastern District of Texas should be finally disposed of.

Defendant undertook to proceed in the Railroad Commission and requested that plaintiff's motion to dismiss the appeal be set for hearing and action, but so far its efforts to get any action at all have been unavailing.

The Commission made no order, except a provision as condition precedent, shown by its pleadings herein for a certain \$10,000.00 bond concerning the Resolution of December 12, 1933 only, and will not act on either of the appeals unless [fol. 184] such bond is filed, although the bond was referable only to the order of December 12, 1933. The Commission was and is without legal authority to require bond as to the order of January 23, 1934, and did not attempt to require bond as to such order; the bond named in its order was totally inapplicable thereto; it was also erroneous and inappropriate even to the order of December 12, 1933, above described. Defendant has not filed such bond, but nevertheless expected to prosecute its appeal and would have done so, if it had not been prevented as herein shown. The appeal from the Resolution of January 23, 1934 was from a denial of an application for increase in rates; the provision for bond was without legal authority since no provision for increase in rates pending the appeal was made, nor could be made under Texas decisions; defendant did not elect to make said bond.

(j) Plaintiff on May 23, 1934 and pending the appeal to the Railroad Commission, filed the second case in the District Court of Bowie County, Texas, now numbered 109 in Equity, in this Federal Court, in large part, like plaintiff's amended pleadings in the first suit, now Case No. 106 in Equity in this Court, except that the new suit, now Case No. 109 in this Court, the Railroad Commission are also made defendants and plaintiff seeks to restrain defendant from taking any steps in the Railroad Commission, and to prevent the Railroad Commission from acting. The Railroad Commission have filed answer. Cases Nos. 106 and No. 109 have been consolidated by court order.

Events in Texarkana, Arkansas

Defendant states that the rates in Texarkana, Texas are governed and regulated by the limitations defined in the special charter of said City as modified and limited by the law and constitution of Texas and that the complicated course of litigation and controversy in Texarkana, Arkansas cannot be followed; if it could be followed, it could not regulate the rates in Texarkana, Texas. Nor can the rates in said City of Texarkana, Arkansas be material. However, if it should be held material, defendant states that in Texarkana, Arkansas defendant in the first part of the year 1930 made application to the City Council of Texarkana, Arkansas for change and modification of the existing rates for gas distribution in the City of Texarkana, Arkansas, the existing rates having been prescribed on May 8, 1923, by ordinance of the City Council of Texarkana, Arkansas.

The City Council of Texarkana, Arkansas on May 30, 1930 passed a Resolution fixing rates for that city. Some time after the last of June 1930 referendum petitions were filed in that city for vote upon said resolution of May 30, 1930 under the Referendum Amendment to the Constitution of Arkansas. However, nothing was done regarding it until 1931 at which time a suit was brought in the Circuit Court of Miller County, Arkansas for mandamus requiring an election. It was adjudged that election should be held concerning the resolution of May 30, 1930 under the Referendum Amendment to the Constitution of Arkansas. The judgment was affirmed in the Supreme Court of Arkansas, *Southern Cities Distributing Co. v. Carter*, 41 S. W. (2d) 1085. Appeal to U. S. Supreme Court was dismissed, 285 U. S. 525, 526. Election was held, continuing the rates of May 8, 1923 and preventing the Resolution of May 30, 1930 from having any application whatever. Defendant then filed suit in the U. S. District Court of Texarkana, Arkansas, and secured a temporary injunction. This was reversed, *City of Texarkana v. Southern Cities Dist. Co.*, 64 F. (2d) 944 (C. C. A. 8). The Court in the original opinion referred to a contract as to rates having been admitted to have been made in Texarkana, Arkansas, but, on re-hearing withdrew the reference to the possibility of a contract as to rates in Arkansas, and placed the reversal on the ground that the election as to the Resolution of May 30, 1930 by vote in the City of Texarkana, Arkansas, had the same effect as if it

had never been passed; that the rates of May 8, 1923, continued as the only lawful or legal rates in Texarkana, Arkansas; that there had been no change in said city; that there had been no prior attempt to gain administrative relief by any method proper for such purpose, and ordered dismissal of the bill without consideration as to whether the rates were confiscatory. Certiorari was denied, 290 U. S. 650. Upon [fol. 187] return to the U. S. District Court, decree of December 1, 1933 enforced the mandate.

Defendant on October 23, 1933 filed with the City Council of Texarkana, Arkansas, a formal application for change and modification of rates in Texarkana, Arkansas. Full hearing was completed on December 22, 1933 resulting in a resolution of the City Council of Texarkana, Arkansas denying defendant's application for change in rates. The City Council of Texarkana, Arkansas on November 14, 1933 had served notice on defendant in Texarkana, Arkansas, that the city council of said city would also consider whether or not the rates collected by defendant for natural gas in Texarkana, Arkansas should not be reduced below the May 8, 1923 rates. The Resolution on December 22, 1933, recited that the city council of Texarkana, Arkansas; did not have evidence from which it could accurately determine certain facts and continued to January 23, 1934 its proceedings in Texarkana, Arkansas, to reduce the rates of May 8, 1923. The said proceedings were again postponed to February 13, 1934. On this last date the City Council of Texarkana, Arkansas, without further evidence, passed a resolution prescribing rates, which were less than those prescribed in the ordinance of Texarkana, Arkansas of May 8, 1923. This resolution has been permanently enjoined.

Defendant prepared bill in equity to enjoin the enforcement of what are called the 1923 rates in Texarkana, Arkansas which had been held to be the only lawful rate in [fol. 188] Texarkana, Arkansas; and on February 9, 1934 gave notice to the City of Texarkana, Arkansas, of application for temporary injunction, to be heard on February 16, 1934, in the United States District Court for the Western District of Arkansas at Fort Smith, Arkansas. The order of the City Council in Texarkana, Arkansas dated February 13, 1934, was passed after notice of said suit and prescribed a lower rate. Whereupon defendant re-drafted its bill in equity to enjoin the prescribed rates in Texarkana, Arkansas, including the last order of the city council.

Hearing on February 16, 1934, of the application for temporary injunction resulted in the Court enjoining the City of Texarkana, Arkansas from enforcing the prescribed rates, or any less rates than the schedule filed by defendant, and from interfering with defendant in charging in Texarkana, Arkansas the rates set forth in the schedule it had filed with the council. The injunction continued in operation from February 16, 1934, until December 4, 1936, when decree was rendered by the District Court permanently enjoining the rates fixed by the city council on February 13, 1934, but dissolving the injunction as to the previous rates. Defendant secured supersedeas and appealed to the United States Circuit Court of Appeals for the Eighth Circuit sitting at St. Louis, Missouri, and has within the last few days docketed the case and filed the record in said court. The case will be subject to hearing and decision in the fall term of 1937.

[fol. 189] The question of determining upon rates to be charged for gas in the City of Texarkana, Arkansas, has been in litigation, and has not yet been finally determined in any permanent way. The basis of rates used for refunds in the City of Texarkana, Arkansas, prior to December 1, 1933, was based on a decree that the rates provided for in the May 8, 1923 ordinance adopted by the City Council of the City of Texarkana, Arkansas, were the only legal or lawful rates and were continued in force at all times since May 8, 1923. The rates in Texarkana, Arkansas since February 16, 1934, are still in contest on appeal as above shown. In view of these facts and circumstances, the pending litigation and the unsettled question as to the Arkansas rates, defendant denies the allegations of plaintiff to the effect that a schedule of rates by which defendant is bound under said Section IX of the ordinance of June 13, 1930, has ever been permanently settled upon in the City of Texarkana, Arkansas.

VII

Confiscation

The rates set forth in Section V of the ordinance of June 13, 1930 are confiscatory and have caused and will continue to cause daily confiscation of defendant's property. The effect of the actions of the City Council of the City of Texarkana, Texas in undertaking to deny to defendant the

right to earn a fair return upon the present fair value of the property used and useful in rendering public utility gas [fol. 190] service to the City of Texarkana, Texas is to deprive defendant of its property without due process of law, deny it the equal protection of the law, and usurp its business management, all in contravention and violation of the Constitution and laws of the state of Texas and of the Fourteenth Amendment to the Constitution of the United States of America. A fortiori, any rate less than the Section V rates would be confiscatory.

(1) That: (a) On the basis of the March 13, 1923 rates for the first half and Section V rates for the second half of the year ending December 31st, 1930, defendant's gross revenue in Texarkana, Texas was \$307,286.76, its expenses \$399,347.90, or a difference of \$92,061.14 between its expenses and gross revenue.

(b) On the basis of Section V rates for the year ending December 31st, 1931, defendant's gross revenue was \$306,640.48, its expenses \$365,812.90, or a difference of \$59,172.42 between its expenses and gross revenue.

(c) On the basis of Section V rates for the year ending December 31st, 1932, defendant's gross revenue was \$261,432.54, its expenses \$327,087.46, or a difference of \$65,654.92 between its expenses and gross revenue.

(d) Except for the first half of 1930, when the March 13, 1923 rates were collected, the rates charged were the Section V rates. If the March 13, 1923 rates should be applied, a greater loss would have resulted in each of said years.

(e) If the rates proposed in defendant's application of November 3, 1933 be applied, defendant's revenue in 1932 [fol. 191] would have been approximately \$313,037.29, its total expenses for said year being \$327,087.46, leaving a difference between gross revenue and expenses of approximately \$14,050.17.

(f) Subsequent years do not materially change the results.

(2) That: (a) The present fair value of defendant's gas distribution system in Texarkana, Texas, used and useful in rendering gas service to its customers in the City of

Texarkana, Texas, as of June 30, 1934, is not less than \$525,195.64, and as of subsequent dates is higher.

(b) Defendant is entitled to interest at the rate of eight per cent per annum on the fair value of said distribution system, amounting to not less than \$42,015.65; that a less rate of return would shake confidence in defendant's securities and would not enable defendant to obtain money for the operation and financing of its business.

(c) Defendant is entitled to an annual depreciation charge of not less than five per cent upon \$411,645.64, the fair value as of June 30, 1934 of the depreciable property in the distribution plant in Texarkana, Texas, amounting to \$20,582.28.

(d) Defendant must take into consideration in the statements of earnings such sums as may be necessary to allow for federal income taxes, calculated to be not less than \$6,698.15.

(e) Defendant, for the service which it renders to gas consumers in the City of Texarkana, Texas, is entitled to [fol. 192] charge rates which will produce sufficient revenue to pay the expenses, an amount for federal income taxes, proper depreciation and reasonable return upon the fair value of the property used and useful in rendering such service. Even on the basis of the rates in the schedule filed in the city council by defendant, defendant would fail by \$83,346.25 in 1932 to earn expenses, an amount for income taxes, depreciation and a reasonable return; the revenues and expenses for subsequent years are even further from producing sufficient to take care of the expenses, an amount for income taxes, depreciation and a reasonable return. Defendant alleges that the experience in the immediate future will not be sufficiently favorable to permit earning expenses, taxes, depreciation and reasonable return.

(3) The relationship between defendant and the Arkansas Louisiana Pipeline Company and Reserve Natural Gas Company of Louisiana, which operated the pipeline system supplying natural gas to defendant for distribution in its distribution system at Texarkana, Texas was that, except for a few shares, the stock of each of said three corporations was owned by the Arkansas Natural Gas Corporation.

Defendant has since acquired the property of said companies.

(4) The distribution plant does not produce natural gas and has no supply for sale and distribution in Texarkana, Texas other than from the system, now owned by defendant, [fol. 193] for which the charge for gas furnished for domestic purposes was \$0.39 per thousand cubic feet, and other rates for gas used for other purposes, which were reasonable charges.

(5) The pipeline system, extending into the states of Arkansas, Texas and Louisiana, produces in part, and purchases at the wells of other producers in part, the gas it transports to distribution systems and other purchasers. The pipeline system is economically and efficiently managed. The rates charged by said system are the lowest reasonable rates which can be charged for gas furnished at Texarkana, Texas. Said rates produce less than expenses, depreciation and a reasonable return on the fair value of the property of said pipeline system and produce less than the value of the service rendered.

(6) The present fair value as of June 1, 1934 of the production and transportation property was not less than \$35,041,826.21.

(7) The revenues and expenses of said pipeline system for 1930, 1931 and 1932 were:

	1930	1931	1932
Revenues	\$7,497,780.07	\$6,534,397.65	\$5,947,160.44
Expenses	4,128,211.14	3,904,185.52	3,314,671.84
Losses in Gasoline Plants	7,609.27	231.61	7,531.09
Earnings Available for depreciation and return on Investment and income Taxes	3,361,959.66	629,280.52	2,624,957.51

[fol. 194] Deducting \$349,130.80 for 1930; \$161,209.30 for 1931; and \$184,124.57 for 1932, for income taxes, and, deducting annual depreciation charge of five per centum of depreciable transportation property of \$1,285,069.70, the

net earnings available for return on the property of said pipeline system were \$1,826,959.16 for 1930; \$1,182,201.52 for 1931; \$1,154,963.24 for 1932; or on \$35,041,826.21, the fair value of the system as of June 1, 1930 a return of 5.21% for 1930; 3.37% for 1931; and 3.30% for 1932.

(8) That the City Council of Texarkana, Texas in undertaking to find whether the rates and charges filed and applied for by the defendant were just and reasonable, found:

(a) That the Arkansas Natural Gas Corporation is substantially owned and actually controlled by the Cities Service Company; that the Cities Service Company is managed and controlled by Henry L. Doherty, doing business as Henry L. Doherty & Company: Whereas, there was no evidence before said council of the ownership of the Arkansas Natural Gas Corporation, or of the control and management by the Cities Service Company or by Henry L. Doherty & Company; such finding with respect to the Arkansas Natural Gas Corporation is incorrect and without foundation. On the contrary, the owners of the preferred stock of the Arkansas Natural Gas Corporation select the majority of the board of directors of that corporation and thereby control the same. Cities Service Company does not own a majority of the preferred stock of said Arkansas Natural Gas Corporation.

(b) That the sums paid to Henry L. Doherty & Company under contract made by Arkansas Louisiana Pipeline Company and the Reserve Natural Gas Company of Louisiana, referred to as "pipeline companies," are not properly chargeable into expenses of such pipeline systems in arriving at the cost and reasonableness of the charges for gas furnished defendant by such pipeline systems, because the cost of the service rendered by Henry L. Doherty & Company to such pipeline companies was not shown: Whereas, under said contracts and the relations of the parties thereto, such charges are reasonable, just and proper for the service rendered. Henry L. Doherty & Company built up and maintained a complete organization for the designing, construction, operation and development of public utilities and natural gas properties. This organization consists of experienced executives, financial advisors, construction, valuation and gas engineers, geologists, technicians, rate experts and accountants. The expense of a system like the said pipeline

systems of maintaining such an organization to provide the services furnished by Henry L. Doherty & Company would be prohibitive. Such contracts placed at the disposal of the pipeline systems, engineering, accounting, geological, business and financial services of a value and of a character and extent which could not be economically acquired by individual systems or any small group of them. Like contracts [fol. 196] are made by other public utilities with similar organizations such as: Ford, Bacon & Davis, Stone & Webster and others. The propriety of such contracts is to be determined by the sound business judgment of the owners of the companies. The activities of Henry L. Doherty & Company of direct benefit to distributing plants and pipeline systems are those tending to increase consumption of natural gas by advertising, developing and marketing of gas burning appliances; geological, technical and research, tax, valuation and rate, purchasing, training of personnel, preparation and care of corporate records, engineering, accounting, auditing, finance and construction.

(c) That the sum of \$66,042.50 paid in 1930 for rentals on non-producing gas leases should not be charged into the operating expenses of the pipeline systems; because such leases are not at present used for production of gas; a considerable part is located in Mississippi, more than a hundred miles from the nearest pipeline of the pipeline companies; the pipeline companies have reserves of gas under their present producing leases adequate to supply their present requirement for approximately five years; these non-producing leases were acquired and are being held for the use of customers whom the pipeline companies hope to serve at least five years in the future: Whereas, such non-producing leases are as to a large percentage thereof, in proven acreage and constitute a fair and reasonable reserve without [fol. 197] which a pipeline system would be of little value. Such leases are located within a reasonable range of the pipeline system and none of such reserves are located so as not to be of full value to the pipeline systems; these located in Mississippi being in the vicinity of pipelines with whom such systems may at any time exchange gas to the advantage of both; and supplies and reserves limited to a period of approximately five years would be wholly inadequate to guarantee continued and uninterrupted service. Maintenance of such gas reserve is not only good business judg-

ment, but an absolute necessity to guarantee adequate and uninterrupted service and a matter in which the city council should not be permitted to substitute its business judgment for that of the management of the said pipeline systems.

(d) That the sum of \$63,666.28 amortization of cost of non-producing leases should not be charged into the operating expense of the pipeline systems, because such leases have not been drilled and proven to be non-productive, and the charge is an amortization of the cost of acquiring such leases and not incurred in connection with the property now used and useful to the present consumers of gas: Whereas, the cost of acquiring such leases amortized over the primary term thereof is a fair and proper charge and necessary to maintain adequate reserves to insure continued and uninterrupted service, dictated by good business judgment and without which the value of the properties of said pipelines [fol.198] would be greatly diminished. Such properties are both used by and useful to the present consumers of gas. None of such reserves have been acquired without first subjecting them to critical geological investigation and analysis.

(e) That the charges for bad debts and adjustments should be reduced to the amounts actually charged off: Whereas, the accrual of such charges is proper and should be included in the expenses for the reason that such accruals are results arrived at by experienced accountants and credit men taking into consideration the experience over a term of years. It is a safe and proper method of arriving at proper charges for bad debts and adjustments of such systems and plants as defendant operates.

(f) That the annual charge of five per cent depreciation on the transportation and general property, excluding producing property should be reduced to two per cent: Whereas, a depreciation allowance of five per cent on the value of the depreciable property is fair, just and reasonable and the allowance of two per cent depreciation, and the finding of the value of \$24,132,581.53, as the depreciable property is unfair, unjust, unreasonable and arbitrary. The actual experience of the pipeline companies demonstrates that the business of producing and transporting gas is a hazardous one, resulting in the continual replacement of pipeline and building of new lines, exhaustion of gas fields and reserves, and the five per cent depreciation is not more than reason-

able, fair and just, and that a less depreciation allowance [fol. 199] is arbitrary, unjust and unreasonable.

The sum of \$24,132,581.53 found by the city council as the value of the depreciable property of the pipeline companies is arbitrary and unreasonable.

The amount of depreciation which should be allowed is not affected by the net balance shown in replacement reserves on the books of the pipeline systems. The actual book charges against reserves in particular years have no relation to the amounts which should be allowed annually against expenses and credited to depreciation reserve account; such actual book charges are not averaged over a life cycle of the entire properties; such experience is not available to the pipeline companies, a large portion of the system of said companies having been built since 1928.

(g) That the present fair value of the property of the pipeline companies, upon which they are entitled to earn a return is not less than \$27,334,274.28: Whereas, as herein-above shown, the fair value as of June 1, 1930, on the basis of cost of reproduction new, less depreciation, is not less than \$35,041,826.21.

The city council, in arriving at its said figures, excluded the sum of \$4,267,120.80, going concern value, which represents cost of attaching and developing the business and which is measured by fixed charges for interest, depreciation and taxes on the portions of the property that are idle or unused during the development period for the time that [fol. 200] such portions were idle and unused. It is a value that an established business has over a business projected but not established.

The city council reduced the sum of \$1,404,382.96 working capital, to \$500,000.00, based on its finding that the expenses of the pipeline companies for a sixty day period would be such sum. The actual experience of the pipeline systems and their estimated needs for the future in maintaining and operating their properties show that the figure found by the city council is inadequate and insufficient to meet the needs of said pipeline systems.

The city council, in arriving at its valuation excluded the sum of \$1,123,505.65, cost of financing. This disregards the actual experience of these and other systems in projecting an enterprise such as this pipeline system, and takes into no account the actual experience of marketing securities

in order to procure capital with which to construct and build such enterprises.

(h) That the rate of return of eight per cent on the valuation of the transportation and general properties of the pipeline systems should be reduced to six per cent because of depressed business conditions and because the pipeline systems were built to carry a greater volume of gas than it is now carrying and because its business is no longer hazardous: Whereas, the percentage of eight per cent is just and reasonable. The experience of these and other pipeline systems in the business of producing and transporting natural gas shows that it is hazardous; that the [fol. 201] sources of supply are constantly being depleted and changed, and the pipeline systems moved, replaced and rearranged. A less rate of return would result in impairing defendant's ability to produce capital or make its securities unattractive; and would result in impairing its ability to render the gas service required by plaintiff, to defendant's detriment and that of its customers.

The said city council, in arriving at its said figures, took into account the experience of said pipeline systems for the year 1930, but based its valuation on prices of 1932 much lower than the valuations in 1930. If the figures of 1930 should be used, the prices of 1930 for valuation purposes should likewise be used.

The rates of return as found by the city council, above shown, were based on erroneous deductions and allowances; they are incorrect and arbitrary and without foundation in fact.

(i) That the amounts paid Henry L. Doherty & Company by defendant for services rendered during the years 1930, 1931 and 1932, amounting to \$5,377.52, \$5,366.21 and \$4,577.07, should be stricken from the expenses of the distribution plant at Texarkana, Texas for the reason that the cost of rendering such services to Henry L. Doherty & Company was not shown: Whereas, for the reasons set forth with respect to the services rendered to the pipeline systems under similar contracts with said Henry L. Doherty & Company, such charges are fair, reasonable, just and proper for the services rendered and a matter of agree-[fol. 202] ment, as to which the sound business judgment of the management of defendant should not be disregarded.

(j) That the proper method of calculating the cost of gas delivered from the pipeline systems is not the price charged nor the cost of the service based on use, but should be fixed on the basis of the proportion of total expenses and return on property which the total gas sold to consumers in Texarkana, Texas bears to the total gas sold by the pipeline companies to all consumers: Whereas, the proper method of calculating such cost to defendant, if not upon the charged price, is not less than the actual cost of the service based on use; the allocation based on the proportion of gas sold to consumers in Texarkana, Texas to the total volume of gas sold by said pipeline companies is arbitrary, unsound and illegal.

(k) That there should be deducted from the value of the property or rate base, upon which a return should be allowed, the sum of \$60,000.00 for going concern value: Whereas, such sum represents an added value, measured by depreciation and interest on idle plant, cost of training men, taxes, and cost of attaching business; or a value which an established business has over a prospective one.

(l) That there should be deducted from the value of the property or rate base, upon which a return should be allowed, the sum of \$20,000.00 for cost of financing: Whereas, such sum is less than the actual cost of securing capital employed in the property and business of defendant in serving its customers in Texarkana, Texas, and is a proper [fol. 203] charge in arriving at the value of the property used and useful in the gas service of defendant in the city of Texarkana, Texas.

(m) That the depreciation rate of five per cent on depreciable property of defendant in Texarkana, Texas, should be reduced to two per cent: Whereas, the depreciation allowance of five per cent on the valuation of the depreciable property of defendant is fair, just and reasonable, and a less rate unreasonable and wholly arbitrary. The actual experience of defendant, its predecessors and others demonstrates that the business of distributing gas in Texarkana, Texas due to shifting of lines, development of service and other factors, requires a calculation of rate of depreciation of not less than five per cent and that a less depreciation allowance is unreasonable and arbitrary.

(n) That no allowance should be made for federal income, tax, either in the expenses of the pipeline systems or the distribution plant, because such tax has not actually been paid: Whereas, the assessment for such tax depends upon net earnings and the effect of the right to file consolidated returns avoiding the payment of income taxes by offsetting gains of some with losses of others, does not destroy the initial liability for such tax, and has been repealed. It is an expense of the plant and systems and must be, as such, taken into account.

(o) That the rate of return of defendant upon the fair valuation of its property used and useful for serving its customers in Texarkana, Texas is six per cent: Whereas, [fol. 204] a rate of return less than eight per cent will result in impairing the ability of defendant to procure capital and to render the gas service required to its customers in Texarkana, Texas, and would be confiscatory.

(p) That the city of Texarkana, Texas, is entitled to free gas for use at its municipal buildings, jails and fire stations: Whereas, the furnishing of free gas to said city for such purposes would further decrease the revenues of defendant and result in further loss and confiscation; plaintiff is wholly without right to require such service, free of cost or without paying the proper rates and charges therefor. Defendant alleges that the proper rates and charges are set forth in defendant's application filed with the city council on November 3, 1933.

(q) That the amounts of unaccounted for gas are in excess of the amount of gas that would be unaccounted for in a properly maintained plant, and that defendant should not be allowed to charge against the consumers in Texarkana, Texas the cost of gas which escapes from the distributing plant in excess of the proper and normal amount: Whereas, the work necessary to bring the distribution plant of defendant at Texarkana, Texas to the standard found by the said city council consists in repairs and not in new construction; the revenues of said distribution system have not been sufficient since defendant's acquisition thereof in 1928, under the rates existing and charged since such date, to reimburse the bare expenses or sum necessary for such [fol. 205] purposes; defendant has been, and will be, unable to make such repairs as may be necessary to effect such

result unless permitted to charge the proposed rates; that is, the leakage found by the said city council can be properly attained only by proper increase in the rates presently prescribed. The cost of such repairs is a proper expense chargeable against revenues and not a capital expense; it should and must be charged to and borne by those receiving the benefits.

(9) Defendant avers that it is suffering a loss in excess of \$350.00 per day by reason of failure to receive sufficient revenue from its operations in the city of Texarkana, Texas; that its revenues from the operation of its properties in Texarkana, Texas are insufficient to pay the operating expenses; that such losses amount to daily confiscation of plaintiff's property; that losses and damages sustained before the hearing cannot be re-couped.

(10) The foregoing property values, depreciation, and return on investment and other considerations bearing upon the sufficiency of the gas rates, are as of June 1, 1934. Since that date and up to the present time, the price of materials, labor, and construction costs have materially increased; the present value of defendant's property has correspondingly increased. Operating and maintenance expenses have likewise increased correspondingly. The revenues, though somewhat increased, are not sufficient to off-set the increase in maintenance and operating expenses. The data brought [fol. 206] up to date would make defendant's earnings situation worse now than it was on June 1, 1934.

Defendant further shows that a new valuation of all the property is now being made and will soon be complete; that such new data should be available by the time this cause will come to trial upon its merits.

(11) That the Fourteenth Amendment of the Constitution of the United States of America provides that no state shall deprive any person of property without due process of law, and guarantees to every person the equal protection of the laws. Defendant is entitled to the benefit and protection of said constitutional provision. Defendant now invokes and urges same as against the actions of said city of Texarkana, Texas with reference to the distribution and sale of gas in said city in undertaking to prevent rates sufficient to avoid confiscation of its property and to earn a

reasonable return above its necessary expenses upon the fair value of its property used and useful in rendering such services.

(12) Defendant states that the effect of the attempts of plaintiff to prevent the charging of the rates filed and applied for, is to impose upon defendant a daily loss amounting to daily confiscation of its property; that any lower rates will fail to yield revenue sufficient to pay expenses of operation, depreciation, taxes and reasonable return upon the fair value of its said property. That the attempt of plaintiff to force defendant to charge less rates than those [fol. 207] applied for, if successful, will deprive it of its property to its damage in a sum or value exceeding three thousand (\$3000.00) dollars, exclusive of interest and costs, without due process of law, and deny defendant the equal protection of the laws; that under the Fourteenth Amendment to the Constitution of the United States no state may deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws: and for the protection of its property defendant does now plead and invoke said provisions of the United States Constitution and the Constitution and laws of the State of Texas. The attempts of plaintiff to keep defendant from putting into effect less rates than those applied for are violative of these provisions of the United States Constitution, and the laws and constitution of Texas.

Wherefore, upon consideration of the Court of its answers and counterclaims defendant prays that the petition and bills of plaintiff be denied; that Sections VIII-A and IX of the franchise ordinance be declared null and void and unapplicable, and be cancelled; that said ordinance be construed to mean that the rates specified should continue until changed, either by an appropriate action on the part of the city or upon application of the defendant; that it be held that the rates filed by defendant in the city council on November 3, 1933 are lawful rates; that the claims made by the plaintiff be cancelled as cloud upon the title of this [fol. 208] defendant to its distribution plant in the city of Texarkana, Texas; that its right to increase its rates as per schedule filed by it be sustained; that defendant recover all costs herein incurred; and defendant prays for such other

and further relief, general and special, to which it may be entitled.

Jno. J. King, Henry C. Walker, Jr., William C. Fitzhugh, William H. Arnold, Jr., Attorneys for Defendant, Arkansas Louisiana Gas Company.

Duly sworn to by Jno. J. King. Jurat omitted in printing.

[fol. 209] EXHIBIT "A" TO AMENDED ANSWER

Found on page 239 Minute Book "K."

Texarkana, Texas,
November 7, 1933.

To the Honorable Mayor and City Council of the City of
Texarkana, Texas:

In re Notice and Application of Southern Cities Distributing
Company Filed November 3rd, 1933

MOTION FOR PROMPT HEARING AND ACTION

I

Applicant, Southern Cities Distributing Company, asks for immediate preliminary hearing and action by the Council upon that part of its application, filed November 3rd, 1933, which asks for immediate authority to place into effect the new schedule of rates contained in its application, pending final hearing. Applicant states that it is essential to avoid daily confiscation of Applicant's property, that the Council have a prompt meeting and hearing and temporarily authorize the new rates to be placed into immediate effect pending final hearing upon reasonable bond or upon Applicant's putting up the difference in the rates in a depository to be named. Applicant is prepared to present its evidence at once.

Applicant further requests the Council to hear it upon this part of the application and not to delay the same; and states that, in the absence of supersedeas, stay, and temporary relief, its application for prompt action would fail to produce relief to which it is entitled and that postpone-[fol. 210] ment would amount to denial of its application

for temporary relief as much as express denial. Applicant now requests and insists that it be accorded a preliminary hearing to show the damage which is being done each day to applicant's property and to show the necessity of immediate action by the Council. If applicant does not place in effect the new rates immediately, it will have no remedy for recovering each day's loss until such time as obtains final relief.

II

Applicant hereto attaches affidavit showing the necessity of immediate preliminary consideration and action by the Council authorizing the Applicant, upon security, to place the new rates into immediate force and effect, pending final hearing, and hereby requests that the Council have a meeting on November 10, 11, 13 or 14, 1933, to pass upon this part of the application and grant stay of the existing rates.

III

Wherefore, Applicant prays: That the Council hold prompt preliminary hearing and grant that part of its application requesting action providing for temporary relief, under bond, supersedeas, or other method; and that the amount of the bond be fixed, or a depository be named in which to impound the difference between the present rates and the rates applied for.

H. C. Walker, Jr., King, Mahaffey, Wheeler & Bryson,
W. H. Arnold, Jr., Attorneys for Applicant, Southern Cities Distributing Company.

[fol. 211] STATE OF LOUISIANA,
Parish of Caddo:

P. F. McBride, being first duly sworn, states on oath that he is Manager of Southern Cities Distributing Company, the plaintiff in the foregoing motion, that he is authorized to make this affidavit, and that he has read the foregoing motion and knows the contents thereof; that the allegations therein contained so far as they relate to his own acts are true, and so far as they relate to the acts of others, he believes them to be true.

That in regard to all other matters and things alleged in the foregoing motion which are now within personal knowl-

edge of this deponent, the deponent has been informed and he verily believes the same to be true.

Paul F. McBride.

Sworn to and subscribed before me this the 7th day of November, 1933. P. L. Penoncel, Notary Public.

STATE OF LOUISIANA,
Parish of Caddo:

On this 7th day of November, 1933, personally appeared before me, a Notary Public in and for the Parish of Caddo, State of Louisiana, J. C. Hamilton, who being first duly sworn deposes and says that he is Engineer in charge of the valuation department of the Arkansas Natural Gas Corporation and is competent and qualified to make the following affidavit:

[fol. 212] That, at the request of the Southern Cities Distributing Company, he has made an audit of the books and records of that company in particular respect to the revenues and expenses of the Texarkana, Texas distributing plant; that such audit shows that the gross earnings realized from the Texarkana, Texas, distributing property for the year ending December 31, 1932 amounted to \$261,432.54; that the total operating expenses, including cost of gas and depreciation, amounted to \$347,071.27; that a computation from the above amounts shows that there was a loss suffered of \$85,638.73 before computation of return on investment and Federal income taxes on same: that a return of eight per cent upon the fair value of the distributing property would be \$41,460.19 and Federal income taxes upon this amount would be \$5,700.78: that the addition of these two items to operating loss, as shown above, shows that the amount by which the distributing property failed to earn expenses, depreciation, return on investment and Federal income taxes on same was \$132,799.70; that it would be necessary for the company to realize on additional gross earnings of \$138,799.70 over that realized during the twelve months period ending December 31st, 1932 in order to earn a sufficient and adequate return upon the fair value of its property; that the company is now and has been suffering an annual loss, as enumerated above, of \$132,799.70 and that it is now and has been suffering a daily loss of \$363.83; that under the rates in force prior to the application of November [fol. 213] 3rd, 1933, the company has been and will be in future unable to realize anything for depreciation or

interest on investment upon the fair value of its property; that the estimated gross revenue expected from the increased rates, included in the above mentioned application, will not under the gas consumption actually experienced for the year 1932 or reasonably to be expected in future, yield more than adequate or reasonable return upon its investment in the City of Texarkana, Texas.

That, all gas is purchased at the town borders of the Texarkana, Texas distributing plant from the Arkansas Louisiana Pipe Line Company; that the price charged for such gas at the delivery point is fair and reasonable and that the Southern Cities Distributing Company would be unable to purchase a continuous and dependable supply of gas from any other source at any less price: that the Arkansas Louisiana Pipe Line Company and the Reserve Natural Gas Company, through whose lines the gas also passes, are efficiently and economically managed: that, although such pipeline companies are efficiently and economically managed, they have not been able to earn all of their expenses, depreciation and a reasonable return upon the fair value of their investment used and useful in producing, buying and transporting gas to the city gates of Texarkana, Texas, and other distributing plants and customers: that the property of the pipeline systems of the two companies has a fair minimum value, as of January 1st, 1932, upon which rates should be based, of \$36,616,007.84: that the gross earning of the pipe line [fol. 214] companies for the twelve months period ending June 30th, 1932 was \$5,957,804.16: that the total expenses, including depreciation, amounted to \$4,878,034.16: that the net amount available for federal taxes and interest and profit on investment was \$1,079,770.00: that federal taxes of \$148,468.38 deducted from this amount would leave \$931,301.62 available for interest and profit upon the present value of \$36,616,007.84: that this would only return 2.54% on the said fair value of such investment which is insufficient and below a reasonable rate of return: that, for several years past, the pipeline companies have failed to earn a reasonable return upon their investment and will as near as can be reasonably expected fail to earn more than a reasonable return upon their investment in future, from town border rates at present in effect.

J. C. Hamilton.

Sworn to before me the 7th day of November, 1933.
P. L. Penoncel, Notary Public.

STATE OF LOUISIANA,
Parish of Caddo:

On this 7th day of November, 1933, personally appeared before me, a Notary Public in and for the Parish of Caddo, State of Louisiana, William H. Lyon, a Valuation Engineer for the Arkansas Natural Gas Corporation, who being first duly sworn deposes and says: that he is an accredited engineer in the employ of the Arkansas Natural Gas Corporation, competent and qualified to accomplish work covered by this affidavit.

That, at the request of the Southern Cities Distributing Company, he has prepared a valuation of the property of that company composing their Texarkana, Texas distributing plant, and has arrived at the present value of said property for rate making purposes: that a complete inventory of said property was made and priced according to the market value of labor and material necessary to reconstruct this property new as of the approximate date of July 1st, 1933: that an actual inspection of a substantial portion of the property was made and from such inspection the physical condition of the material was obtained, the per cent condition of each item or each group of similar items arrived at, and such per cent condition was applied to the reproduction cost new value to arrive at the present value of the physical property: that there was added to such value of the physical property the working capital, going concern value and cost of financing to arrive at the present fair value of the property for rate making purposes: that this value, as of said date, as stated in the notice and application for change and modification of rate, filed November 3rd, 1933, is in excess of the sum of \$515,000.00, and that this is the minimum value that should be used in computing the rate of return on this property.

That, he has prepared a valuation of the property of the Arkansas Louisiana Pipe Line Company and the Reserve Natural Gas Company as of January 1st, 1932, which valuation amounts to \$36,616,007.84: that, the prices on this date used in such valuation were lower than they had been for several years prior, thereto, and were lower than prices are now or which may be expected: that, such valuation was carefully and efficiently prepared after a complete and detailed inventory and inspection of the property, and that it represents the minimum value upon which the Ar-

kansas Louisiana Pipe Line Company and Reserve Natural Gas Company are entitled to base the depreciation and return on investment for rate making purposes.

Wm. H. Lyon.

Sworn to before me the 7th day of November, 1933.
P. L. Penoncel, Notary Public.

Filed Nov. 9, 1933.

EXHIBIT "B" TO AMENDED ANSWER

Minute Record No. 11, page 230, May 1, 1923

Southwestern Gas and Electric Company's Resolution, Increasing the Rates to be Charged for Natural Gas, Introduced, Read and Adopted

Alderman Temple introduced, and the City Attorney read the following resolution: "Whereas, the Southwestern Gas & Electric Company, a private corporation, has heretofore been, and is now, engaged in and carrying on, in the City of Texarkana, Arkansas, the business of furnishing natural [fol. 217] gas to the citizens of said city, for domestic and commercial purposes as fuel, and for lighting or illumination and for other purposes; and

Whereas, for the aforesaid services so performed by it, the Southwestern Gas & Electric Company has heretofore charged the rates and exercised the rights and privileges following:

Article A. For furnishing natural gas for domestic and commercial purposes and for lighting or illumination in any character of institution whatsoever and for all other purposes—(except for gas used in internal combustion engines and except for fuel used under boilers and in furnaces where gas is used as fuel for strictly manufacturing purposes)—thirty-five cents per one thousand cubic feet for all monthly consumption at any individual installation ranging up to and including one hundred thousand feet; and sixteen cents per one thousand cubic feet for all monthly consumption at any individual installation above one hundred thousand cubic feet, with ten per cent discount applying on monthly accounts when accounts for service rendered are paid at the company's office on or before ten days following date of bill.

Article B. For furnishing natural gas as fuel for manufacturing purposes, twelve cents, net, per one thousand cubic feet.

Article C. For furnishing natural gas for use in internal combustion engines, thirty-five cents per one thousand cubic [fol. 218] feet, with ten per cent discount applying on monthly accounts when accounts for service rendered are paid at the company's office on or before ten days following date of bill.

Article D. In the event that the consumption of gas by any consumer at any individual installation under the prevailing rates does not amount to a net sum of fifty cents for any one month, a net sum of fifty cents is charged to each consumer for such months service at each installation, said charge being known as "A Minimum Charge."

Article E. If on account of non-payment of bills or violation of any rule or regulation, the Company is obliged to shut off the supply of gas of any consumer, a charge of one dollar will be made for turning same on again for such consumer so cut off, and a like charge will be made to each consumer requiring the moving of a meter oftener than once in any twelve months period; and

Whereas, the said Southwestern Gas and Electric Company has heretofore, on the 10th day of April, 1923, given public notice of its purpose and intention to increase the rates and charges for the aforesaid services heretofore prevailing, and by said notice advised the public that it will, hereafter on the 15th day of May, 1923, put into effect the scale of rates and charges for natural gas service supplied by it in the City of Texarkana, Arkansas, and vicinity, here-[fol. 219] inbelow set forth, and has given notice to the City Council of the City of Texarkana, Arkansas, of its intention to put into effect on said date the scale of rates and charges for natural gas service supplied by it in the City of Texarkana, Arkansas, and vicinity, as follows:

Article A. For furnishing natural gas for domestic and commercial purposes and for lighting or illumination in any character of institution whatsoever and for all other purposes—(Except for gas used in internal combustion Engines and except for fuel used under boilers and in furnaces where gas is used as a fuel for strictly manufacturing

purposes)—fifty cents per one thousand cubic feet for all monthly consumption at any individual installation ranging up to and including one hundred thousand cubic feet, and twenty two cents per one thousand cubic feet for all monthly consumption at any individual installation above one hundred thousand cubic feet, with ten per cent discount applying on monthly accounts for services rendered at any individual installation when accounts for services rendered are paid at the company's office on or before ten days following date of bill.

Article B. For furnishing natural gas for use as fuel within boilers and furnaces only for the consumption of gas as fuel for strictly manufacturing purposes, the following schedule of net rates per one thousand cubic feet shall apply for monthly consumption at any individual installation:

[fol. 220]

Consumption of Gas per month in cubic feet	Net rate per one Thou- sand Cubic feet
First—Five hundred thousand cubic feet	Twenty-one Cents net
Next—One Million Cubic feet	Twenty Cents net
Next—One Million Cubic feet	Nineteen Cents net
Next—One Million Cubic feet	Eighteen Cents net

And for all monthly consumption at any individual installation above three million five hundred thousand cubic feet per month seventeen cents net per one thousand cubic feet, with the understanding that bills for monthly consumption shall be rendered at a gross rate of ten per cent higher than the foregoing net prices, which additional amount of billing will be allowed as a discount provided bills for each month's service are paid at the company's office within ten days following date of bill.

Article C. For natural gas furnished for use in interman combustion engines the rate shall be forty cents per one thousand cubic feet for all monthly consumption at any individual installation, with ten per cent discount when bills for monthly services rendered are paid at the company's offices within ten days following date of bill.

Article D. In the event that the consumption of gas by any consumer at any individual installation under the rates herein prescribed does not amount to a net sum of fifty [fol. 221] cents for any one month, then the said Southwestern Gas & Electric Company, its successors and assigne, are hereby granted the right to charge such consumer for each installation a net sum of fifty cents for such month's service, whether there is any consumption of gas or not, said charge to be known as "A Minimum Charge" and to be of the amount and nature as the charge hereinbefore prevailing in Texarkana, Arkansas and vicinity.

Article E. If on account of non-payment of bills or violation of any rule or regulation, the said Southwestern Gas & Electric Company is obliged to shut off the supply of gas of any consumer, a charge of one dollar will be made for turning same on again for such consumer so cut off, and a like charge will be made to each consumer requiring the moving of a meter oftener than once in any twelve months period, the charges under this article being the same in amount and nature as the charges now and hereinbefore prevailing in ~~Texarkana~~ Texarkana, Arkansas, and vicinity; and

Whereas, it has been made to appear to the City Council of the City of Texarkana, Arkansas, and they are of the opinion that the rates and charges proposed to be put into effect by the said Southwestern Gas & Electric Company hereafter on May 15, 1923, are just and reasonable rates and charges:

Therefore, Be it Resolved, that the City Council of Texarkana, Arkansas, hereby approves the following rates and charges for natural gas service supplied by the Southwestern Gas & Electric Company to the citizens of the City of [fol. 222] Texarkana, Arkansas, and vicinity, to be effective on and after the 15th day of May, 1923, to-wit:

Article A. For furnishing natural gas for domestic and commercial purposes and for lighting or illumination in any character of institution whatsoever and for all other purposes—(Except for gas used in internal combustion engines and except for fuel used under boilers and in furnaces where gas is used as fuel for strictly manufacturing purposes)—fifty cents per one thousand cubic feet for all monthly consumption at any individual installation rang-

ing up to and including one hundred thousand cubic feet, and twenty-two cents per one thousand cubic feet for all monthly consumption at any individual installation above one hundred thousand cubic feet, with ten per cent discount applying on monthly accounts for services rendered at any individual installation when accounts for services rendered are paid at the company's office on or before ten days following date of bill.

Article B. For furnishing natural gas for use as fuel within boilers and furnaces only for the consumption of gas as fuel for strictly manufacturing purposes, the following schedule of net rates per one thousand cubic feet shall apply for monthly consumption at any individual installation.

Consumption of Gas per Month in Cubic Feet	Net rate per one thou- sand cubic feet
First—Five hundred thousand cubic feet	Twenty-one cents net
Next—One Million cubic feet	Twenty cents net
Next—One Million cubic feet	Nineteen cents net
Next—One Million cubic feet	Eighteen cents net

[fol. 223] And for all monthly consumption at any individual installation above three million five hundred thousand cubic feet per month seventeen cents per one thousand cubic feet net, with the understanding that bills for monthly consumption shall be rendered at a gross rate of ten per cent higher than the foregoing net prices, which additional amount of billing will be allowed as a discount, provided bills for each months service are paid at the company's office within ten days following date of bill.

Article C. For natural gas furnished for use in internal combustion engines the rates shall be forty cents per one thousand cubic feet for all monthly consumption at any individual installation, with ten per cent discount when bills for monthly services rendered are paid at the company's office within ten days following date of bill.

Article D. In the event that the consumption of gas by any consumer at any individual installation under the rates herein prescribed does not amount to a net sum of fifty cents for any one month, then the said Southwestern Gas &

Electric Company, its successors, and assigns, are hereby granted the right to charge such consumer for each installation a net sum of fifty cents for such month's service, whether there is any consumption of gas or not, said charge to be known as "A Minimum Charge" and to be of the same amount and nature as the charge hereinbefore prevailing in Texarkana, Arkansas, and vicinity.

[fol. 224] Article E. If on account of non-payment of bills or violation of any rule or regulation, the said Southwestern Gas & Electric Company is obliged to shut off the supply of gas of any consumer, a charge of one dollar will be made for turning same on again for such consumer so cut off, and a like charge will be made to each consumer requiring the moving of a meter oftener than once in any twelve months period; the charges under this Article being the same in amount and nature as the charges now and hereinbefore prevailing in Texarkana, Arkansas and vicinity.

After the reading of the above resolution Alderman Cook made a motion, which was seconded by Alderman Chestnutt, that the Southwestern Gas & Electric Company be notified by the City Attorney, to appear before this Council and show reason why such increased rates and charges should be put into effect. The Mayor ordered the roll called on the above motion, and the following vote was recorder: Alderman Cook and Harris voted Aye. Alderman Orr, Thomas, Chestnutt, Ford, Dreyer and Temple voted Nay. Total Ayes 2. Total Nays 6. The Mayor declared the motion lost. Thereupon Alderman Temple made a motion, which was duly seconded by Alderman Ford, that the above resolution be adopted. The Mayor ordered the roll called on the motion for adoption, and the following vote was recorded: Alderman Orr, Thomas, Chestnutt, Ford, Dreyer and Temple voted Aye. Alderman Cook and Harris voted [fol. 225] Nay. Total Ayes 6. Total Nays 2. The Mayor declared the resolution duly passed.

Approved May 8, 1923.

(Signed) George T. Conway, Mayor.

Attested: W. W. Shaw, City Clerk.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Consolidated Cases Nos. 106 and 109, in Equity

MOTION THAT DEFENDANT'S PLEADING FILED JULY 14, 1937
BE RECOGNIZED AND ORDERED APPLICABLE TO BOTH CASES—
Filed July 19, 1937

To the Honorable Judge of Said Court:

Comes now Arkansas Louisiana Gas Company, defendant in the above entitled and numbered causes, and shows the Court:

[fol. 226] That Cause No. 106 and Cause No. 109 have heretofore been consolidated by order of this Court; that following consolidation of said causes plaintiff has filed a supplemental pleading; that defendant on July 14, 1937 filed separate amended answer to plaintiff's original, amended and supplemental pleadings, and counterclaim.

Wherefore defendant moves that the Court make an order recognizing such filing and providing they be taken to apply as defendant's additional pleadings in both cases Nos. 106 and 109 In Equity.

Jno. J. King, Henry C. Walker, Jr., William C. Fitzhugh, William H. Arnold, Jr., Attorneys for Defendant, Arkansas Louisiana Gas Company.

[File endorsement omitted.]

[fol. 227] IN UNITED STATES DISTRICT COURT

Consolidated Cases Nos. 106 and 109, in Equity

[Title omitted]

ORDER GRANTING DEFENDANT'S MOTION TO RECOGNIZE ADDITIONAL PLEADING TO APPLY IN BOTH CASES—Filed July 18, 1937

On this the 19 day of July, 1937, came on to be heard the Motion of Arkansas Louisiana Gas Company for order regarding defendant's separate amended answer to plaintiff's original, amended and supplemental petitions and counter-

claim filed July 14, 1937 and it appearing to the court that the Motion should be granted,

It is Therefore Ordered that said pleading is recognized and it is ordered that it be taken and considered as applying in both Causes Nos. 106 and 109 In Equity.

Randolph Bryant, Judge.

[File endorsement omitted.]

[fol. 228] IN UNITED STATES DISTRICT COURT

Consolidated Cases No. 106 and No. 109, in Equity

[Title omitted]

MOTION OF PLAINTIFF TO STRIKE "SEPARATE AMENDED ANSWER OF DEFENDANT, ARKANSAS LOUISIANA GAS COMPANY TO PLAINTIFF'S ORIGINAL AND SUPPLEMENTAL PETITION: AND COUNTER-CLAIM OF ARKANSAS LOUISIANA GAS COMPANY"—Filed July 19, 1937

To the Honorable Randolph Bryant, Judge of said Court:

Comes the plaintiff, the City of Texarkana, Texas, and moves the court to strike the "*Separate Amended Answer of Defendant, Arkansas Louisiana Gas Company, to Plaintiff's Original and Supplemental Petition; and Counter-Claim of Arkansas Louisiana Gas Company*" and for cause says:

1. Said answer does not state a defense to the plaintiff's cause of action as set up in its original and supplemental bill herein and does not, in said counterclaim, set up any facts constituting a cause of action against the plaintiff.

2. Said pleading does not allege any material facts which occurred after the defendant's former pleadings filed herein [fol. 229] and does not allege that the defendant was ignorant, when its former answer and counter-claim was filed, of any facts set up in this pleading.

3. The defendant in said pleading seeks to have the court hold that the rates filed by the defendant in the City Council on November 3, 1933, are lawful rates and that said rates be approved by this court. Said pleading was filed after the

effective date of the Johnson Act, Title 28 U. S. Code, Sec. 41 as amended May 14, 1934, C. 283, paragraph 1, 48 Stat. at L. 775. In none of the pleadings filed prior to May 14, 1937, in this cause, nor in any part thereof, was any such relief prayed. The only relief prayed in pleadings filed by the defendant prior to May 14, 1934, was that Sections VIII-A and IX of the franchise of June, 1930, be declared null and void. Said answer shows on its face that this court does not, under the Johnson Act, have jurisdiction to grant the relief prayed by the defendant to the effect that its rate schedule which was rejected by the City Council be put into effect.

4. Said pleading is not proper under Rule 34 of the Equity Rules in that the defendant in its answer and counter-claim formerly filed herein alleged that the Railroad Commission of Texas refused to recognize the appeal of the gas company from the order of the council refusing to grant an increase in rates on the ground that the company had refused to comply with a requirement of the Commission that it file [fol. 230] a bond in connection with such appeal. Said allegation is contained in Section XX of the answer formerly filed herein.

In its pleading which the company now seeks to file, it alleges that the Railroad Commission did not prescribe said bond as a condition to the appeal from the order refusing to grant an increase in rates, but that it demanded said bond as a condition to the appeal from the order of the City Council directing the defendant to comply with Section IX of the franchise. Said pleading does not show that the facts so differently alleged occurred after the former pleading was filed or that the defendant was ignorant of the facts when said former pleading was made.

Wherefore, premises considered, the plaintiff prays that the "Separate Amended Answer of Defendant, Arkansas Louisiana Gas Company, to Plaintiff's Original and Supplemental Petition; and Counter-claim of Arkansas Louisiana Gas Company" be stricken and for a decree as prayed in its original and supplemental bill herein.

Ed. B. Levee, Jr., B. E. Carter, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT
OF TEXAS, TEXARKANA DIVISION

Consolidated Cases Nos. 106 and 109, in Equity

CITY OF TEXARKANA, TEXAS, Plaintiff,

VS.

ARKANSAS LOUISIANA GAS COMPANY et al., Defendants

DECREE—Filed July 31, 1937

On this the 30th day of July, 1937, court being in session, came on to be heard the actions of the City of Texarkana, Texas, as plaintiff, against Arkansas Louisiana Gas Company as defendant, which the court finds from the record herein was filed in this court on removal from the state district court of Bowie County, Texas, on the 20th day of December, 1933, and further finds from the record that said defendant having the name at that time of Southern Cities Distributing Company, filed its original answer and counterclaim therein on the same date, and which cause was numbered [fol. 232] upon the docket of this court, No. 106 In Equity, and came on also to be heard the action of said City of Texarkana, Texas, as plaintiff, against Arkansas Louisiana Gas Company and others, which the court finds from the record herein was filed in this court on removal from the state district court of Bowie County, Texas, being numbered 109 In Equity in this court, said actions being heretofore consolidated in this court, the plaintiff in each of said causes being present and represented by its attorneys, Ed. B. Levee, Jr., and B. E. Carter, and the defendant in each of said actions being present and represented by its attorneys, Jno. J. King, W. H. Arnold, Jr., and W. C. Fitzhugh. The pleadings of the plaintiff and of the defendants in both of said actions, including the amended answer and counterclaim filed in the two actions on July 19th, 1937, were read to the court, said pleadings being all of the pleadings filed in both cases Nos. 106 and 109. Thereupon the plaintiff, through its said attorneys, presented and urged the plaintiff's motions to strike said defendant's original and amended answers and counterclaims and all other pleadings of said defendant in each and both of said actions; and

the court after hearing the argument and being advised as to the law, is of the opinion that said motions are well taken as to each and both of said actions, as said defendant's pleadings in the opinion of the court are as a matter of law insufficient either as answers or counterclaims.

It is, therefore, ordered, adjudged and decreed by the Court that the plaintiff's said motions to strike said defendant's [fol. 233] original and amended answers, counterclaims and all other pleadings of said defendant, be and the same are sustained as to each of said actions and as to both of said actions and said pleadings are now stricken; to which action of the Court with reference to each of said actions and as to both of them the said defendant in open court excepted, and its exceptions were by the Court allowed.

Said defendant not applying to the Court for leave to further amend in either of said actions, the Court thereupon finds: That Section IX of the ordinance finally passed and approved by the City Council of the City of Texarkana, Texas, on June 13, 1930, is a binding contract between the parties, and that the defendant from said date to the present time has been collecting from its domestic and commercial consumers in the City of Texarkana, Texas, the rates prescribed in Section V of said ordinance; and treating said Section IX as a binding contract, as the Court does, the Court considering what further relief the plaintiff is entitled to, concludes and finds:

1. During the period from June 13, 1930, to December 1, 1933, the defendant collected from its domestic and commercial consumers in the city of Texarkana, Arkansas, similar rates. On December 1, 1933, a decree in the United States District Court for the Western District of Arkansas wherein defendant in this case was plaintiff and the City of [fol. 234] Texarkana, Arkansas, et al., were defendants, being No. 203 In Equity in said court, held that the rates of May 8, 1923, were the lawful rates in Texarkana, Arkansas; and ordered defendant to refund all amounts collected since May 30, 1930, in excess of the amounts that would have been collected under the rates prescribed on May 8, 1923, by the City Council of Texarkana, Arkansas.

For periods of time prior to December 1, 1933, no refunds are due plaintiff or gas consumers in Texarkana, Texas; Section IX is inapplicable to such period. Plaintiff saves exceptions.

2. During the period from December 1, 1933, to February 16, 1934, defendant collected from its consumers in Texarkana, Texas, the Section V rates; and from the consumers in Texarkana, Arkansas, the rates prescribed on May 8, 1923, by the City Council of Texarkana, Arkansas. This court finds that defendant was bound under Section IX to charge in Texarkana, Texas, the Arkansas rates of May 8, 1923, for said period and plaintiff is entitled to recover refunds for the difference in said rates covering said period.

3. On February 16, 1934, a temporary injunction was granted by the District Court for the Western District of Arkansas wherein this defendant was plaintiff, and the City of Texarkana, Arkansas, et al., were defendants being No. 209 In Equity in said court; said injunction protected defendant from interference during the life of said temporary injunction, in charging in Texarkana, Arkansas rates that had been on October 23, 1933, filed by defendant with the City Council of Texarkana, Arkansas. These rates were higher than the Section V rates then charged in Texarkana, Texas. Said temporary injunction was partially dissolved by a decree of said United States District Court for the Western District of Arkansas, on December 4, 1936, and the consumers in the city of Texarkana, Arkansas, recovered judgment against defendant amounts collected in excess of the amounts which would have been produced under the rates of May 8, 1923. Defendant appealed from this decree of December 4, 1936, and superseded said judgment for refunds; said cause is as yet undetermined and is now on appeal in the Circuit Court of Appeals for the Eighth Circuit. Said Federal Court in Arkansas refused an injunction pending the appeal and since December 4, 1936, defendant has been collecting in Texarkana, Arkansas, under said 1923 rates. The court finds that no reduction in rates should be ordered in Texarkana, Texas, under Section IX of the 1930 ordinance, until and unless the above decree in Arkansas should be finally affirmed. Plaintiff's claim for rate reduction from February 16, 1934, to the present time is premature and plaintiff is not now entitled to have the rates reduced in Texarkana, Texas, nor to recover any refunds from and after February 16, 1934. Plaintiff's bill insofar as it seeks refunds for this period and a present reduction in rates is dismissed without prejudice to a new suit in the event the Ar-

[fol. 236] kansas case should be affirmed. The plaintiff excepts to this finding.

II

Section VIII-A of the franchise is in the opinion of the court valid and enforceable, but the question raised by plaintiff's and defendants' pleadings as to said Section VIII-A has become moot since the filing of this suit; more than the time required for notice has elapsed since defendant gave notice on November 4, 1933.

It is therefore ordered, adjudged and decreed that plaintiff recover of defendant, Arkansas Louisiana Gas Company, a sum equal to the difference between the amounts actually collected from the Texarkana, Texas, consumers from December 1, 1933, through February 16, 1934, and the amounts which would have been due from the said consumers under the Arkansas rates of May 8, 1923, reserving to said defendant the right to assert any offsets it may have and to plaintiff and its attorneys any claims they may have against said refunds for attorney's fees or under assignments. Plaintiff shall recover all costs against Arkansas Louisiana Gas Company. Each of the other claims and demands of plaintiff and of all defendants are rejected.

To each finding and conclusion of the court defendant Arkansas Louisiana Gas Company separately and severally objected and excepted and asked that its exceptions be noted [fol. 237] for record which is accordingly done. Plaintiff excepts to the refusal of the court to order refunds for the periods from June 13, 1930, to December 1, 1933, and from February 16, 1934, to the present time and to order the Arkansas rates to be placed in effect in Texas now.

Signed this 31st day of July, 1937.

Randolph Bryant, Judge.

O. K. as to form: Ed B. Levee, Jr., B. E. Carter, Attorneys for Plaintiff.

O. K. as to form: W. H. Arnold, Jr., W. C. Fitzhugh, Jno. J. King.

[File endorsement omitted.]

[fol. 238] IN UNITED STATES DISTRICT COURT

Nos. 106 and 109, in Equity, Consolidated Cases

[Title omitted]

PETITION FOR APPEAL—Filed September 23, 1937

To the Honorable Judge of Said Court:

Now comes Arkansas Louisiana Gas Company, defendant in the above entitled and numbered cause, feeling aggrieved by the final decree granted and entered in this cause dated July 30, 1937, and shows the court that it wishes to appeal from said decree to the Circuit Court of Appeals for the Fifth Circuit, for the reasons specified in the Assignment of Errors filed herewith.

Defendant respectfully requests this court to grant supersedeas of the decree heretofore entered and would show the court that the decree entered finally disposes of the question of certain refunds and directs defendant to pay to the City of Texarkana, Texas for the benefit of certain gas consumers of that city the difference between two certain gas rate schedules covering a period of time from December 1, 1933 to February 16, 1934; the amount of refunds involved for said period is approximately four thousand seven hundred (\$4,700.00) dollars.

[fol. 239] Defendant further shows that a previous Order of this court has consolidated causes No. 106 and No. 109 In Equity; that no good purpose can be served by taking separate appeals from the decree heretofore entered, which decree disposes of both cases as consolidated, and that defendant is desirous of taking up its appeal on both cases on a single record for review of both cases.

Wherefore, defendant prays that its appeal be allowed and that citation issue as provided by law, that a transcript of the record proceedings and papers upon which said decree is based and including all proceedings in both No. 106 and No. 109 In Equity, and as consolidated, duly authenticated, be sent to the United States Circuit Court of Appeals for the Fifth Circuit and that the record so made shall constitute the record on appeal for both cases.

That said appeal be ordered to operate as a supersedeas of the decree heretofore entered in this cause and as con-

solidated; and that all further proceedings in this court be suspended and stayed until the final determination of this appeal; that proper bond be fixed in amount and conditioned in accordance with law; and that such other orders be made as necessary and proper to enable defendant to perfect its appeal.

Jno. J. King, H. C. Walker, Jr., W. H. Arnold, Jr.,
W. C. Fitzhugh, Attorneys for Defendant, Arkansas
Louisiana Gas Company, Appellant.

Copy received 9-16-37. Ed B. Levee, Jr., B. E. Carter,
Attys. for City of Texarkana, Tex.

[fol. 240] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Nos. 106 and 109, in Equity, Consolidated Cases

[Title omitted]

ASSIGNMENTS OF ERRORS—Filed September 23, 1937

And now, on this the 23 day of September, A. D., 1937 came defendant and appellant, Arkansas Louisiana Gas Company, herein referred to as defendant, by its solicitors, John J. King, H. C. Walker, Jr., W. C. Fitzhugh and W. H. Arnold, Jr., and says that the decree dated July 30, 1937 and duly entered in each of the above causes is erroneous and unjust to defendant for the following reasons:

I

Because the court erred in striking out defendant's answer and counterclaims on the ground that the said pleadings are as a matter of law insufficient to constitute defense to plaintiff's claims and insufficient to constitute counterclaim on behalf of said defendant.

II

The court erred in striking out defendant's answers to plaintiff's original and supplemental pleadings on the ground of being insufficient as a matter of law to constitute a defense to plaintiff's pleadings.

III

The court erred in sustaining plaintiff's petitions against defendant in part and in adjudging that for the period of time from December 1, 1933 to February 16, 1934 plaintiff recover from defendant reparations equal to the difference between the receipts collected in said period under the rates prescribed by the City Council of Texarkana, Texas in Section V of the ordinance of June 13, 1930 and the receipts that would have been collected if defendant had for such period applied in Texarkana, Texas those rates that are set forth in an ordinance passed by the City Council of Texarkana, Arkansas for application in the city of Texarkana, Arkansas and dated May 8, 1923.

IV

The court erred in limiting the dismissal of plaintiff's petition for reparation for periods of time succeeding February 16, 1934 to a dismissal without prejudice, and erred [fol. 242] in not dismissing the bill with prejudice to a new suit for such periods of time, unconditional on what might be the termination of the Arkansas suit.

V

The court erred in holding that rates less than those prescribed by the City Council of Texarkana, Texas in Section V of the ordinance of June 13, 1930 were required to be applied in the City of Texarkana, Texas for the period of time from December 1, 1933 to February 16, 1934.

VI

The court erred in holding in effect that Section V of the ordinance of June 13, 1930 does not contain the only lawful and legal rates in Texarkana, Texas, except insofar as defendant, by reason of having pursued the administrative remedies, is entitled to increase said rates on account of being unreasonably low and confiscatory.

VII

The court erred in holding that Section IX of the ordinance of June 13, 1930 which provides:

"Section IX: If Grantee shall be finally compelled to or should voluntarily place in any rates in the City of Texar-

kana, Arkansas less than the rates granted by this Ordinance, then and thereupon the lessened rate shall apply in the City of Texarkana, Texas, and Grantee shall not be [fol. 243] authorized or permitted to charge and collect any higher rates."

and defendant's acceptance of the ordinance in which said Section appears constituted a contract as to Section IX thereof.

VIII

The court erred in holding that Section IX of the ordinance of June 13, 1930 is valid, notwithstanding the conflict with the laws and Constitution of Texas, and particularly the following:

- (a) Article 1124, Revised Civil Statutes of Texas;
- (b) Article 1, Section 17, Constitution of Texas;
- (c) Article XII, Sections 3 and 4, Constitution of State of Texas,
- (d) The City Charter.

IX

The court erred in holding in effect that Section IX does not conflict with the City Charter which provides that an ordinance shall be considered to contain an express stipulation reserving rates under the jurisdiction of the regulatory power.

X

The court erred in holding that Section IX is not in violation of the prescribed power of the city nor of the prescribed method of its exercise and that the prescribed method does not exclude other methods and need not be followed.

[fol. 244]

XI

The court erred in rejecting without a hearing defendant's allegations that the resolution of December 12, 1933 ordering defendant amongst other things to comply with the city's construction of Section IX herein quoted is invalid: because passed without notice to defendant and without evidence or hearing; because passed in only one reading, the city charter requiring three separate readings in three separate meetings; because there was no publication

as required by the city charter; because of non-compliance with the charter requirements as to title, caption, style, emergency, non-reference to committee, reporting back vote on same day of introduction and failure to record proper vote; and because the resolution is invalid on the same grounds set out in relation to Section IX which grounds are separately and severally here made by reference without repetition.

XII

The court erred in holding in effect that the City Council may provide for change of rates other than by the exercise of its regulatory power under the requisites of law, and erred in holding that the prescribed rates of Section V were for a period of time properly required to be reduced under the terms of Section IX.

XIII

The court erred in holding that said Section IX does not violate the city charter of Texarkana, Texas, especially the [fol. 245] provisions and condition that the City Council shall not prescribe any rates which will yield less than 10% per annum.

XIV

The court erred in holding that Section IX is valid, because there is no power or authority for the fixing of conditional rate, nor provision for change of rates on a contingency or future event, or rates to take effect in the present subject to being revoked and abrogated by the happening of some subsequent event or condition.

XV

The court erred in holding that Section IX of the ordinance of June 13, 1930 is valid, notwithstanding attempted unlawful delegation, or vesting in extra-territorial authorities and bodies outside the State of Texas, the non-delegable power to regulate and fix rates within the State of Texas under the laws applicable thereto.

XVI

The court erred in holding that the variation of rates dependent on conditions in another city and state is valid, and in holding that Section IX is valid notwithstanding its

making controlling in Texarkana, Texas the rates prescribed in the adjoining city of Texarkana, Arkansas.

[fol. 246]

XVII

The court erred in holding in effect that the exercise of the regulatory power and duty of the City Council of Texarkana, Texas as shown in Section V is inferior to asserted contract as to rates; and erred in holding that the rates prescribed in Section V of the ordinance of June 13, 1930 were for the period from December 1, 1933 to February 16, 1934 in conflict with and were suspended by contractual provisions of Section IX contained in the same ordinance of June 13, 1930.

XVIII

The court erred in holding in effect that Section IX is not too vague and obscure to be enforceable, and in holding that its meaning is susceptible of ascertainment.

XIX

The court erred in holding Section IX applicable to the period of time from December 1, 1933 to February 16, 1934.

XX

The court erred in holding that Section IX is applicable to the case at bar, notwithstanding the decree of December 1, 1933 of the Court in Arkansas was not based on, and the court did not enter into the merits of the rates in that case.

[fol. 247]

XXI

The court erred in holding that Section IX is applicable to the facts in the case at bar notwithstanding the rates in Arkansas were not legally or lawfully changed at any time after May 8, 1923.

XXII

The court erred in holding that Section IX is applicable regardless of the fact that defendant under the intent of said Section has not since June 13, 1930 been finally compelled to and has not voluntarily placed into effect any rates in Texarkana, Arkansas less than the rates prescribed in the ordinance of June 13, 1930 in Texarkana, Texas.

XXIII

The court erred in holding that Section IX is applicable notwithstanding defendant made application and exhausted all administrative remedies open to it to secure relief from confiscatory rates.

XXIV

The court erred in holding Section VIII-A of the ordinance of June 13, 1930 to be valid.

XXV

The court erred in rejecting without a hearing defendant's allegations that Section VIII-A, even if valid, has been waived by the action of the City Council in calling upon defendant to go through complete rate hearings, and in having full hearings; and in rejecting defendant's allegations that the existing rates or any less rates were confiscatory and defendant entitled to disregard them.

XXVI

The Court after holding all questions as to Section VIII-A to have become moot since the filing of this suit, erred in rejecting without a hearing defendant's allegations that the existing or any less rates were confiscatory and defendant entitled to disregard them.

XXVII

The court erred in striking out defendant's counterclaims as a matter of law because this deprived defendant of hearing upon the cause of action set forth in said counterclaims.

XXVIII

The court erred in rejecting without a hearing defendant's allegations that the order of the City Council of Texarkana, Texas dated January 23, 1934 rejecting application for increased rates and the Section V rates amount to confiscation of defendant's property in Texarkana, Texas, and erred in rejecting without a hearing the allegations that defendant was entitled to relief from Section V rates and any lower rates.

XXIX

The court erred in rejecting defendant's allegations that defendant after pursuit of the administrative remedies was

entitled to a judicial hearing in the court below upon its allegations that enforcement of the Arkansas rates in Texarkana, Texas for the period of time from December 1, [fol. 249] 1933 to February 16, 1934 would be confiscatory of defendant's property in the city of Texarkana, Texas and that defendant was not properly limited to said rates.

XXX

Each of the foregoing errors are separately and severally assigned to case No. 106; and each one is also separately and severally assigned as to case No. 109; and defendant prays that the court enter an order to such effect.

Wherefore, defendant prays that the said decree be reversed, that plaintiff's bill be dismissed, and that the case be remanded with instructions to the District Court to proceed to a hearing on defendant's counterclaims, for costs and such other and further relief, general and special in law and in equity as may be proper.

John J. King, H. C. Walker, Jr., W. C. Fitzhugh,
W. H. Arnold, Jr., Attorneys for Defendant, Arkansas Louisiana Gas Company, Appellant.

Copy received 9-16-37. Ed B. Levee, Jr., B. E. Carter, Attorneys for City of Texarkana, Texas.

[File endorsement omitted.]

[fols. 250-251] Supersedeas bond on appeal for \$5,000.00, approved and filed September 23, 1937, omitted in printing.

[fol. 252] IN UNITED STATES DISTRICT COURT

Nos. 106 and 109, in Equity, Consolidated Cases

[Title omitted]

ORDER GRANTING APPEAL—Filed September 23, 1937

This day came on to be heard defendant, Arkansas Louisiana Gas Company, on its petition for appeal from the decree in the above entitled and numbered causes as consolidated

to the United States Circuit Court of Appeals for the Fifth Circuit, together with an assignment of errors, having moved for an order to be made providing that the record on appeal be made to include all papers in both No. 106 and 109 In Equity as consolidated to constitute the record [fol. 253] for both cases on appeal and fixing the amount of security which defendant should give and furnish upon said appeal, and having moved that a supersedeas be granted and all further proceedings in this court be suspended and stayed until a final determination of this appeal; the court finds that said petition for appeal should be granted as prayed.

It is Therefore Ordered that Arkansas Louisiana Gas Company, defendant in the above entitled cause, be, and it is hereby granted an appeal from the final decree in this cause, as consolidated, to the United States Circuit Court of Appeals for the First Circuit.

That the record on appeal shall include all proceedings and papers in both No. 106 and No. 109 In Equity, and as consolidated, and such record is to constitute the record on appeal in both cases and as consolidated.

That upon said defendant, Arkansas Louisiana Gas Company, filing with the Clerk of this court a good and sufficient bond in the amount of \$5,000.00, to the effect that if the said defendant shall prosecute said appeal to effect and answer all damages and costs and shall make good refunds which may be due if it fails to make its plea good, then the said obligation to be void, otherwise to be and remain in full force and effect, the said bond to be approved by this court, that all further proceedings in this court be, [fols. 254-255] and they hereby are suspended and stayed until the final determination of said appeal.

This the 23 day of September, 1937.

Randolph Bryant, Judge.

O. K. as to form: Ed. B. Levee, Jr., B. E. Carter, Attys.
for City of Texarkana, Tex.

Citation, in usual form, showing service on Ed. B. Levee, Jr., filed September 23, 1937, omitted in printing.

[fol. 256] IN UNITED STATES DISTRICT COURT

No. 106 and No. 109, in Equity, Consolidated

[Title omitted]

PRAECIPE FOR TRANSCRIPT—Filed September 23, 1937

To Marjorie Minton, United States District Clerk:

Kindly prepare, under Equity Rule 76, Record for Appeal to include the following, avoiding the inclusion of more than one copy of the same paper and excluding the formal and immaterial parts of each instruments:

Case No. 106

1. November 16, 1933. Plaintiff's Original Petition including:

Exhibit "A": Ordinance of June 13, 1930 and acceptance of ordinance by Southern Cities Distributing Company.

[fol. 257] Exhibit "B": Notice and Application of Southern Cities Distributing Company for Change and Modification of Rates.

2. November 16, 1933. Order that clerk issue Writ of Injunction as prayed for, signed by R. H. Harvey, Bowie District Judge.

3. November 16, 1933. Writ of Injunction, issued November 16, 1933 and filed November 23, 1933. Do not include the petition quoted in said writ, refer to Item 1 above. Include Sheriff's return.

4. November 18, 1933. Do not copy Citation, state: "Citation issued November 16, 1933, served November 18, 1933 and filed November 23, 1933."

5. November 22, 1933. Do not copy Notice, state: "Notice of Petition and Bond for Removal to the Federal Court dated November 21, 1933 was acknowledged by plaintiff November 22, 1933."

6. November 22, 1933. Petition for Removal and Bond filed November 22, 1933 by Southern Cities Distributing Company, and Order of Removal dated November 24, 1933.

7. November 22, 1933. Show: "Transcript was filed in the District Court of the United States for the Eastern District of Texas, Texarkana Division on December 20, 1933."

Do not copy Notice, Bill of Cost, or Transcript on Removal.

8. December 20, 1933. Defendant's Answer and Cross-action.

9. January 15, 1934. Amended and Substituted Bill in Equity filed by City of Texarkana, Texas, including:

[fol. 258] Exhibit "A". Ordinance of March 13, 1923.

Exhibit "B". Ordinance of June 13, 1930 and acceptance. Do not copy, refer to Exhibit "A" of the Original Petition, Item 1.

Exhibit "C". Notice and Application of Southern Cities Distributing Company for Change and Modification of Rates. Do not copy, refer to Exhibit "B" of plaintiff's Original Petition, Item 1.

Exhibit "D". Decree of December 1, 1933 United States District Court for the Western District of Arkansas.

10. March 9, 1934. Defendant's Answer to Amended and Substituted Bill in Equity, and Amended and Substituted Answer and Amended and Substituted Cross Bill and Counterclaim.

11. September 24, 1934. Plaintiff's Motion to Strike out answer and counterclaim of Southern Cities Distributing Company.

12. January 18, 1935. Motion to record change of name of Southern Cities Distributing Company to Arkansas Louisiana Gas Company.

13. January 18, 1935. Order that the name of Arkansas Louisiana Gas Company be substituted in all proceedings herein in lieu of Southern Cities Distributing Company; and that the style of the cause be changed to: "City of Texarkana, Texas v. Arkansas Louisiana Gas Company."

14. September 18, 1935. Order of Consolidation. Do not copy; state:

[fol. 259] "The order is that Case No. 106 and Case No. 109 consolidated; and that plaintiff's motion to strike out the answer and counterclaim of defendant in Case No. 109 In Equity be considered as going to and applying also to defendant's answer of counterclaim in Case No. 106."

15. December 30, 1936. Supplemental Bill of City of Texarkana, Texas, including:

Exhibit "1". Decree of December 4, 1936 of the United States District Court for the Western District of Arkansas.

Exhibit "2". Order of December 16, 1933 of the United States District Court for the Western District of Arkansas.

16. July 14, 1937. Separate Amended Answer of Defendant, Arkansas Louisiana Gas Company, to Plaintiff's Original and Supplemental Petition: and Counterclaim of Arkansas Louisiana Gas Company.

17. July 19, 1937. Motion that defendant's pleading filed July 14, 1934 be recognized and ordered applicable to both cases.

18. July 19, 1937. Order recognizing defendant's plead-
filed July 14, 1937 and ordering that it be taken to apply
as defendant's additional pleadings in both cases 106 and
109 In Equity.

19. July 19, 1937. Motion of plaintiff to strike "Separate
Amended Answer of defendant, Arkansas Louisiana Gas
Company to plaintiff's Original and Supplemental Petition:
and Counterclaim of Arkansas Louisiana Gas Company."
[fol. 260] 20. July 30, 1937. Final Decree.

21. September —, 1937. Petition for Appeal, Assign-
ments of Errors, Bond, Order Granting Appeal, Citation in
Appeal, Service, this Praecipe, and Clerk's Certificate.

Case No. 109

22. May 23, 1934. Petition of Texarkana, Texas vs.
Southern Cities Distributing Company and others, includ-
ing:

Exhibit "A". Ordinance of March 13, 1923. Do not copy,
refer to Exhibit "A" of plaintiff's Amended and Substi-
tuted Bill in Equity in Case 106, Item 9.

Exhibit "B". Ordinance of June 13, 1930 and acceptance
by Southern Cities Distributing Company. Do not copy,
refer to Exhibit "A" of plaintiff's Original Petition in
Case 106, Item 1.

Exhibit "C". Notice and Application of Southern Cities
Distributing Company for Change and Modification of
Rates. Do not copy, refer to Exhibit "B" of plaintiff's
Original Petition in Case 106, Item 1.

Exhibit "D". Resolution of January 23, 1934.

Exhibit "E". Decree of December 1, 1933. Do not copy,
refer to Exhibit "D" in Item 9.

23. May 23, 1934. Do not copy Citation, state: "Cita-
tion issued May 23, 1934, was served on the same day."

24. June 11, 1934. Answer of Defendants Railroad Commission of Texas filed in Bowie District Court.

[fol. 261] 25. June 1, 1934. Do not copy Notice of Removal, state: "Notice of Removal to the Federal Court was duly given on June 1, 1934."

26. June 2, 1934. Petition and Bond for Removal, filed June 2, 1934; Amended Petition for Removal, filed June 11, 1934.

27. June 11, 1934. Order of June 11, 1934 Bowie District Court overruling Petition for Removal.

28. June 13, 1934. Do not copy Transcript, state: "Transcript of the record of Bowie District Court was on June 13, 1934 filed in the United States District Court for the Eastern District of Texas, Texarkana Division."

29. June 13, 1934. Petition to Federal Court for Removal and for an order restraining plaintiff from proceeding in the state court.

30. June 13, 1934. Plaintiff's Motion to Remand.

31. June 13, 1934. United States District Court Order removing cause to the Federal Court, overruling motion to remand, and enjoining plaintiff from further proceeding in the Bowie District Court in said suit.

32. July 12, 1934. Answer and Counterclaim of Southern Cities Distributing Company.

33. September 24, 1934. Plaintiff's motion to strike out said answer and counterclaim. Do not copy, refer to Item 11 above.

34. January 18, 1935. Motion to Record Change of Name of said defendants to Arkansas Louisiana Gas Company.

[fol. 262] 35. January 18, 1935. Order substituting the name of Arkansas Louisiana Gas Company in lieu of Southern Cities Distributing Company and changing the style of cause to: "City of Texarkana, Texas vs. Arkansas Louisiana Gas Company and Lon A. Smith, C. V. Terrell and Ernest O. Thompson, Members of the Railroad Commission of Texas."

36. September 18, 1935. Order of Consolidation. Do not copy, refer to Item 14 above.

37. December 30, 1936. Supplemental Bill of City of Texarkana, Texas. Do not copy, refer to Item 15 above.

38. July 14, 1937. Separate Amended Answer of defendant, Arkansas Louisiana Gas Company to plaintiff's Original and Supplemental Petition, and Counterclaim of

Arkansas Louisiana Gas Company. Do not copy, refer to Item 16 above.

39. July 19, 1937. Motion that defendant's pleading filed July 14, 1934 be recognized and ordered applicable to both cases. Do not copy, refer to Item 17 above.

40. July 19, 1937. Order recognizing defendant's pleading filed July 14, 1937 and ordering that it be taken to apply as defendant's additional pleadings in both cases 106 and 109 In Equity. Do not copy, refer to Item 18 above.

41. July 19, 1937. Motion of plaintiff to strike "Separate Amended Answer of Defendant, Arkansas Louisiana Gas Company to Plaintiff's Original and Supplemental Petition: [fol. 263] and Counterclaim of Arkansas Louisiana Gas Company." Do not copy, refer to Item 19 above.

42. July 30, 1937. Final Decree. Do not copy, refer to Item 20 above.

43. September —, 1937. Notice, Motion for Summons and Severence, Order of Severence.

44. September —, 1937. Petition for Appeal, Assignments of Errors, Bond, Order Granting Appeal, Citation in Appeal, Service, this Praeipe. Do not copy, refer to Item 21 above.

45. September —, 1937. Certificate. Make Clerk's Certificate as to this case.

This September 23, 1937.

John J. King, H. C. Walker, Jr., W. C. Fitzhugh,
W. H. Arnold, Jr., Attorneys for Defendant, Ar-
kansas Louisiana Gas Company.

Receipt acknowledged of a copy of the above praeci-pe and service thereof waived this the 22nd day of September, 1937.

City of Texarkana, Texas, by Ed. B. Levee, Jr., B. E. Carter, Its Attorneys.

[File endorsement omitted.]

[Fol. 264] IN DISTRICT COURT OF BOWIE COUNTY, TEXAS,
FIFTH JUDICIAL DISTRICT

No. 109. In Equity

PLAINTIFF'S ORIGINAL PETITION—Filed May 23rd, 1934

To the Honorable Judge of Said Court:

Now comes the City of Texarkana, Texas, a municipal corporation, chartered and incorporated under and by virtue of the laws of the State of Texas, situated in the County of Bowie, State of Texas, hereinafter called plaintiff, complaining of the Southern Cities Distributing Company, a corporation duly incorporated and doing business in the City of Texarkana, Bowie County, Texas, and owning and operating a natural gas distributing plant through a system of pipes over and under the streets and alleys of the City of Texarkana, Texas, and selling natural gas to the inhabitants of said City for household and commercial purposes, and of Lon A. Smith, C. V. Terrell and Ernest O. Thompson, who are the members of the Railroad Commission of the State of Texas, hereinafter styled defendants, and for cause of action plaintiff represents to the Court:

1.

The City of Texarkana, Texas, is a municipal corporation organized under a special act of the State Legislature which was passed on November 2, 1905. It brings this suit on [fol. 265] its own behalf and also as the representative of and as trustee for all the consumers of natural gas in said City.

The Southern Cities Distributing Company is a corporation and is the owner of a franchise, hereinafter described, for the distribution of natural gas in the City of Texarkana, Texas, and owns and operates a natural gas distributing plant in said City.

The defendants, Lon A. Smith, C. V. Terrell and Ernest O. Thompson are the members of the Railroad Commission of Texas.

On March 13, 1923, the City Council of the City of Texarkana, Texas, passed an ordinance, at the request of the Southwestern Gas and Electric Company, which then owned the natural gas distributing franchise in said City, amending said franchise and granting to said Company an increase in rates; a copy of said franchise of 1923 is hereto attached,

marked Exhibit A, and made a part hereof and referred to herein as such.

Thereafter, in 1928, said Southwestern Gas and Electric Company transferred its franchise to the present defendant the Southern Cities Distributing Company.

In 1930, the Southern Cities Distributing Company applied to the City Council for an increase in rates and after a hearing the Council rejected this application and said Southern Cities Distributing Company then appealed to the Railroad Commission of Texas and said Commission came to Texarkana and conducted hearings on said application on [fol. 266] May 28 and 29, 1930. While the hearings were going on and while testimony was being taken before said Commission the Company proposed to the City Council a compromise of said rate controversy, said compromise granting it certain increases in rates, and said compromise was then and there agreed upon between the Southern Cities Distributing Company and the City of Texarkana, Texas. The hearing before the Commission was thereupon discontinued and no findings were made and no order was entered by the Commission. The Council passed an ordinance in the nature of a franchise agreement, as authorized by Sections 160 to 164, 196 of said special act of 1905, which was the City Charter, setting up the terms of said compromise agreement. After publication as required by law, this ordinance was passed and approved on June 13, 1930, and the Southern Cities Distributing Company accepted the same and agreed to the terms thereof by an instrument in writing dated June 17, 1930, and filed with the City Secretary of the said City on June 18, 1930; a copy of this ordinance, together with the writing accepting and agreeing to the terms thereof, is hereto attached as Exhibit "B," made a part hereof and referred to herein as such.

By reason of such acceptance of said franchise with all its terms and conditions and by reason of the fact that the Southern Cities Distributing Company has since enjoyed the benefits thereof, said franchise became a binding agreement and said Southern Cities Distributing Company became bound thereby to the City of Texarkana, Texas, and [fol. 267] the consumers of gas therein to carry out the terms of said agreement and to supply gas under the rates and terms and conditions therein granted, established, accepted and agreed to and said company is now estopped from attacking any of the terms and conditions therein con-

tained and from changing or attempting to change the rates therein set forth.

Plaintiff especially pleads Section VIII-A of said franchise agreement, which is as follows:

"Section VIII-A. In consideration of the granting of this franchise, it is mutually agreed and understood by and between the parties hereto that before the City Council of said City shall apply for a reduction in rates, or before the Southern Cities Distributing Company, its successors or assigns, shall make application for an increase in rates, either party shall give to the other party one year's notice in writing of its intention to so apply for an increase or decrease in rates, and no application for increase or decrease in rates shall be acted upon or considered unless said one year's notice is first given before making such application."

Said franchise agreement has not been amended, modified or repealed, nor has any attempt been made to amend, modify or repeal said agreement in any manner.

The Southern Cities Distributing Company did on the 3rd day of November, 1933, file with the City Secretary an instrument in writing styled "Notice and Application of Southern Cities Distributing Company for Change and Modification of Rates to Go Into Immediate Effect." A [fol. 268] copy of said notice is hereto attached, marked Exhibit C and made a part hereof and referred to as such.

Notwithstanding Section VIII-A of said franchise agreement the Southern Cities Distributing Company stated in its notice aforesaid that it would place the proposed increased rates into effect on November 23rd, 1933.

The plaintiff says that said notice that increased rates would be placed into effect on November 23rd, 1933, and the attempt of the said Southern Cities Distributing Company to place same in effect was in violation of Section VIII-A of said franchise agreement.

On the 4th day of November, 1933, the defendant Southern Cities Distributing Company filed with the City Secretary of the plaintiff City an instrument in writing as follows:

"Texarkana, Texas,
November 2nd, 1933.

"To the Honorable Mayor and Members of the City Council of the City of Texarkana, Texas:

"You are hereby notified pursuant to the terms of a certain franchise, dated June 13, 1930, that the grantee therein,

Southern Cities Distributing Company, will apply for an increase in rates one year after date of giving this notice.

"This notice contemplated an application for an increase in rates over such rates as have been applied for pursuant to the application of said grantee, Southern Cities Distributing [fol. 269] Company, now pending, for an immediate increase in rates upon which Southern Cities Distributing Company is requesting and will seek prompt hearing and action.

"Southern Cities Distributing Company, by Paul F. McBride, General Manager."

"Filed: G. D. Garrett, City Secretary, November 4, 1933."

Thereafter, on November 14, 1933, the City Council passed a resolution in which it recited that, without waiving any of its rights under said franchise agreement, it was willing, if proper information be submitted to it, to consider the question whether the provisions of said franchise contract were oppressive and whether it should waive the same, and calling upon said Southern Cities Distributing Company to furnish certain information from which the Council could determine said question. Thereafter, certain information was filed with the Council and the Council met on January 22, 1934, and considered said information and also considered the evidence then submitted orally by the Southern Cities Distributing Company and also the evidence of an expert accountant employed by the City to advise it, and having heard the same the Council thereupon passed a resolution denying said application for an increase in rates and making certain findings, which may be summarized as follows:

[fol. 270] A. That the Council had not waived the provisions of the franchise contract providing for one year's notice before any application for an increase in rates should be heard and that the Council had entered into the hearing and had considered the evidence solely for the purpose of determining whether or not the facts were such as should cause the Council to consider such provision of the franchise contract to be so oppressive that the Council should consent to waive the same.

B. That on the basis of the evidence submitted a rate of forty-five cents (45¢) net per thousand cubic feet for domes-

tic gas was in excess of all the compensation due the Distributing Company and the pipe line company, including depreciation and a fair return upon the value of its property, and that the Council could not find that the franchise provision for a year's notice was oppressive and that the Council could find no reason for waiving the same.

C. That no evidence had been submitted from which the Council could find that the present rates did not fully compensate the Company.

The Council thereupon declined to waive the franchise provision for one year's notice and ordered that the Company should not put the proposed increased rates into effect.

A copy of this resolution of January 23, 1934, is hereto attached as Exhibit D, made a part hereof and referred to herein as such.

[fol. 271] Thereafter, in violation of said provision of its franchise hereinabove quoted and in violation of its agreement and contract to supply gas to the consumers in the City of Texarkana, Texas, under the rates, terms and conditions set up in said franchise the defendant, the Southern Cities Distributing Company, filed with the Railroad Commission of the State of Texas on March 5, 1934, an appeal from the said refusal of the City Council, in which appeal it asked the Railroad Commission of Texas to set aside the order of the Council refusing to grant it an increased rate and asking that the Railroad Commission establish and fix the rates which had been applied for by said Company. It also asked the Railroad Commission to grant it a temporary increase in rates under bond.

On March 12, 1934, the Railroad Commission of Texas made an order allowing said appeal on condition that the Company be required to give good and sufficient bond in the sum of ten thousand dollars (\$10,000.00). Said order provided that upon the filing and approval of said bond the action of the Council should be suspended and superseded. The plaintiff says that the said bond has never been posted by the said Southern Cities Distributing Company.

The plaintiff says that said Section VIII-A of said franchise agreement constitutes a valid and binding waiver by the Southern Cities Distributing Company of any right it may have under the Statutes of the State of Texas to secure

an increase in rates except upon the terms and conditions [fol. 272] prescribed in said franchise agreement, to-wit, upon the giving of one year's notice before any such increase should be applied for; that the attempt of the Southern Cities Distributing Company to secure an increase by an appeal to the Railroad Commission under the facts above stated is in violation of said franchise agreement; and that said Company having waived its right to secure increased rates except after giving one year's notice of its intention to apply for same the said Railroad Commission is without jurisdiction and is without power to relieve the Company from its contract to supply gas at the rates prescribed in said franchise agreement and that the plaintiff is entitled to an injunction restraining the Southern Cities Distributing Company from proceeding with said appeal and restraining the defendants, the members of the said Railroad Commission, from entertaining said appeal and from hearing the same and from taking any action thereon and from taking any action with reference to gas rates in the City of Texarkana, Texas, until after said Southern Cities Distributing Company has complied with the provisions of the said franchise agreement calling for one year's notice.

The plaintiff in this section of its petition, as well as in the other parts of this petition, is suing not only for its own benefit as a consumer of gas but is suing as the representative of and as trustee for and for the use and benefit of all the gas consumers in the City of Texarkana, Texas. These consumers are very numerous there being more than thirty-[fol. 273] five hundred (3,500) of them, and it is impracticable to bring them all before the Court. The claim of the City and of all these gas consumers as set forth in this section is based upon the same facts and arises out of the same contract provisions and said consumers, as a whole, constitute a class, all of whom have the same rights against the defendant and this plaintiff is the proper representative of all such consumers. The Statutes of the State of Texas confer upon this plaintiff, as such representative, the right to make franchise contracts for the distribution of gas and the rates at which it should be distributed.

Under such powers and as the representative of such consumers, the City entered into the franchise agreement and contract with the Southwestern Gas and Electric Company dated March 13, 1923, a copy of which has been heretofore

set forth as an exhibit to this petition. Said Franchise of 1923 provided, in part, as follows:

"Article E: It is further understood between the said Southwestern Gas & Electric Company, its successors and assigns, and the City of Texarkana, Texas, that the said Southwestern Gas & Electric Company shall not at any time charge for furnishing gas either to domestic or industrial consumers in the City of Texarkana, Texas, a greater sum or charge than it at the same time charges and collects from like consumers for similar service in the City of Texarkana, Arkansas."

[fol. 274] Thereafter, as hereinbefore set out, said franchise was transferred by said Southwestern Gas and Electric Company to the defendant in this case, the Southern Cities Distributing Company. The franchise agreement entered into between the City and the said defendant on June 13, 1930, and accepted and agreed to by the defendant as heretofore described, a copy of which franchise and which acceptance and agreement have been heretofore made a part of this petition, contained the *the* following provision:

"Section IX. If Grantee shall be finally compelled to, or should voluntarily, place in any rates in the City of Texarkana, Arkansas, less than the rates granted by this Ordinance, then and thereupon the lessened rate shall apply in the City of Texarkana, Texas, and Grantee shall not be authorized or permitted to charge and collect any higher rate."

The plaintiff says that said provision of said franchise of 1923 and said provision of said franchise of 1930 were accepted and agreed to by the grantees of said franchises in both cases, in consideration of the agreement on the part of the City that certain increased rates should be collected. Any said agreements, more especially the agreement contained in the franchise of 1930, are valid and binding contracts on the part of the defendant. Said provision is a just and proper provision to prevent discrimination against the gas consumers in the City of Texarkana, Texas. The City of Texarkana, Texas, and the City of Texarkana, Arkansas, are one community, being separated only by a state line. [fol. 275] The natural gas distributing plant owned by the Southern Cities Distributing Company serves both cities;

consumers in Texarkana, Arkansas, are served from identically the same mains as consumers in Texarkana, Texas, and all of the gas which supplies both cities is purchased at the town borders of Texarkana, Texas, from the Arkansas and Louisiana Pipe Line Company, a company all of whose stock, except the qualifying shares of directors, is owned by the Arkansas Natural Gas Corporation, which corporation also owns all of the stock of the Southern Cities Distributing Company, the defendant in this case. Said provision in said franchise does not waive any of the rate regulating powers conferred upon the City Council by the Statutes of the State of Texas, and it is a just and proper provision to prevent discrimination against the consumers in Texarkana, Texas. Said agreement was within the corporate powers of the Southern Cities Distributing Company. Its predecessor in title made such agreement in 1923 as one of the considerations to induce the City to grant increased rates at that time without a contest or controversy in the Courts. The present defendant made such agreement in 1930 as one of the considerations to induce the City to enter into a compromise agreement with it granting increased rates at a time when a controversy over such increased rates was being actually contested before the Texas Railroad Commission. Said agreement is a valid and binding agreement. The defendant [fol. 276] proposed such agreement to the City Council and has been exercising and enjoying the privileges conferred upon it therein.

At the time said compromise agreement was made, a similar compromise agreement was entered into between the Southern Cities Distributing Company and the City of Texarkana, Arkansas, whereby the same rates agreed to in Texas were to be placed in effect in Texarkana, Arkansas. Referendum petitions against such compromise agreement were at once circulated in Texarkana, Arkansas, and given a great deal of publicity in the newspapers. These petitions were circulated and this publicity took place prior to the action of the Council on June 13, 1930, in passing said franchise ordinance. It was then contemplated by both parties that said compromise agreement in Arkansas might be upset by means of said referendum petitions, and said Section IX of said franchise agreement was designed to take care of the situation in the event said compromise agreement should be upset in Texarkana, Arkansas.

Thereafter, as a result of said referendum petitions, said compromise agreement was upset, rejected, nullified and set aside as to Texarkana, Arkansas. The constitution of that State provides that any measure against which a referendum petition is filed shall remain in abeyance until the election is held. Because of litigation said referendum election was not held until May 28th, 1932, at which time said compromise agreement was overwhelmingly rejected. On the same day, to-wit, May 28th, 1932, the Southern Cities Distributing Company filed a suit in the United States District Court in Arkansas to prevent the referendum election from having any effect. This suit has been finally decided and on December 1, 1933, the United States District Court for the Western District of Arkansas entered its final decree in said matter, a copy of which decree is hereto attached, marked Exhibit E and made a part hereof and referred to herein as such.

This decree orders, among other things, the following:

1. That on and after December 1, 1933, the Southern Cities Distributing Company should supply gas to the consumers in Texarkana, Arkansas, at the old rates which were in effect prior to said compromise agreement of May, 1930, which old rates are the same as those set forth in the franchise agreement of 1923 between the City of Texarkana, Texas, and the Southwestern Gas and Electric Company, a copy of which has been heretofore made a part of this petition, and which were the same rates which were in effect in Texarkana, Texas, prior to the compromise agreement of May, 1930, as embodied in said franchise of June 13, 1930. Said Southern Cities Distributing Company has complied with said order of the Federal District Court and supplied gas to the consumers in the City of Texarkana, Arkansas, at said old and lower rates until February, 16, 1934, when it obtained a temporary injunction against such rates in a case now pending and not yet tried.

[fol. 278] In violation of Section IX of its franchise agreement said defendant failed and refused to put said lower rates in effect in Texarkana, Texas, and continued to charge its consumers in Texarkana, Texas at the higher rates provided for in said compromise agreement. The City Council called upon the defendant to comply with said Section IX of its franchise agreement and to place in effect in Texarkana, Texas, the lower rates which it charged in Texarkana,

Arkansas, until February 16, 1934, and called upon it to stop and desist from discriminating against the gas consumers of Texarkana, Texas; and said defendant failed and refused to stop the discrimination and failed and refused to comply with its franchise agreement and is still continuing to charge and exact from the consumers of gas in Texarkana, Texas, the higher rates provided in its franchise agreement of June, 1930, which rates are higher than those which it collected in Texarkana, Arkansas, until February 16, 1934.

2. Said decree of December 1, 1933, in the United States District Court for the Western District, also determined that the collection by the defendant of the rates provided in said compromise agreement of May, 1930, from the time when said rates were placed in effect in June, 1930, down to and including its collections up to December 1, 1933, were unlawful and illegal insofar as the rates exceeded those in effect in said City prior to May, 1930, and said Court ordered said defendant to make refunds to all of its consumers in [fol. 279] Texarkana, Arkansas, of the difference between the amounts actually collected by it under the rates provided in said compromise agreement and the amounts which it should have collected under the rates which were lawfully in effect, which rates the Court found and determined to be the rates which were in effect prior to said compromise agreement and which this plaintiff alleges to be the rates set up in the franchise of March, 1923, which has been heretofore made an Exhibit to this petition.

The plaintiff says that the consumers of gas in the City of Texarkana, Texas, are entitled to an order from this Court directing said Southern Cities Distributing Company to at once place in effect in the City of Texarkana, Texas, the lower rates provided in the franchise of 1923, and that such consumers are further entitled to an order and judgment from this Court directing the defendant to make refunds to such consumers for the excess collected by said Company from the time said increased rates were put into effect in June, 1930, down to February 16, 1934, over and above the amount which was due to said Company under the rates provided in said franchise agreement of 1923. The plaintiff says that said decree of the United States District Court in Arkansas compelled the defendant to place in effect in Texarkana, Arkansas, as of May 30th, 1930, rates less than the rates shown in the franchise agreement of

June 13th, 1930, between this plaintiff and this defendant, [fol. 280] and that said franchise agreement provides that if said defendant is compelled to place any such lower rates in effect in Texarkana, Arkansas, that the lesser rates shall apply in the City of Texarkana, Texas.

The plaintiff says further that it has received from numerous gas consumers in the City of Texarkana, Texas, assignments to the plaintiff of a part of such refunds as may be due them and that such assignments were granted to the City for the purpose of paying the expenses of this litigation and for the purpose of paying the expenses of the present controversy now pending as to increased rates, and that it would be unfair and unjust to this plaintiff to permit the defendant to defeat its right to recover under such assignments by any offsets which it might claim against such refunds arising on and after the date of the filing of this petition.

The plaintiff says that it and the gas consumers of the City of Texarkana, Texas, are without any adequate remedy at law and that unless restrained the defendant, Southern Cities Distributing Company, will prosecute its appeal before the Railroad Commission of the State of Texas, and will place into effect rates in excess of those provided for in said franchise agreement and that the members of the said Railroad Commission will proceed with the hearing of said Appeal and to the plaintiff's damage in the sum of fifty thousand dollars (\$50,000.00).

[fol. 281] Premises considered, the plaintiff, for its own use and benefit, and as the representative of and as trustee for all of the consumers of gas in the City of Texarkana, Texas, and for the use, and benefit of all such gas consumers, prays:

1. That the Court set this application down for hearing upon such notice as may be required by law and that upon such hearing the Court grant its most gracious writ of injunction restraining the Southern Cities Distributing Company from putting into effect any increase in rates in the City of Texarkana, Texas, except after having given one year's notice of its intention to apply for such increase and from putting any increased rates into effect at any time or in any other manner except at the time and in the manner provided in said franchise agreement and restraining it

from prosecuting and from taking any further steps in its appeal which has been lodged before the Railroad Commission of Texas and restraining the individual defendants who are the members of the said Railroad Commission of Texas from proceeding with said appeal and from taking any steps to grant an increase in rates to the Southern Cities Distributing Company in Texarkana, Texas, except upon the terms and after the notice agreed to by said company in said franchise agreement, and should enjoin the defendant, Southern Cities Distributing Company, from raising and from attempting to raise and from taking any steps before the Railroad Commission or before the Courts in an attempt to raise its rates in violation of said Section VIII-A of said franchise agreement.

2. That the Southern Cities Distributing Company be ordered and directed to comply with Section IX of its franchise agreement and to at once place in effect in the City of Texarkana, Texas, the rates for gas which it was compelled to place in effect in the City of Texarkana Arkansas, by said decree of December 1, 1933, of the United States District Court of the Western District of Arkansas. If, for any reason, the Court should find that the defendant should be permitted to continue to charge its present rates pending the determination of said rate litigation now pending as to the rates in Texarkana, Arkansas, then the Court should permit the defendant to continue to charge its present rates only upon condition that it give bond in a sum to be fixed by the Court, conditioned that in the event it is not successful in maintaining the rates which it is now collecting under a temporary restraining order in Texarkana, Arkansas, and is compelled to make refunds down to the basis of a lower rate, then that the Company should also make refunds to its consumers in the City of Texarkana, Texas, down to the basis of such lower rates.

3. That the defendant be ordered and directed to file with the Clerk of the Court, and to deliver a copy to this plaintiff, a statement under oath showing all monies collected by it from its consumers in Texarkana, Texas, under the rates provided in said franchise agreement of June 13, 1930, from [fol. 283] the time said rates were first put into effect down to and including all collections under such rates down to February 16, 1934, and shall show as to each of such con-

sumers the name and address of each consumer, the amount of gas supplied each month from each consumer under such rates and the amount which would have been due from each consumer under the rates of the franchise of 1923, and the difference for each month between the amount so collected and the amounts which would have been due under such 1923 rates, and that the Court should order said defendant to pay into the registry of this Court at the time such statement is filed the total excess between the amount so collected and the amount so due, without any deducting for any effect, setoff or counterclaims of any kind whatsoever, plus all the fees, costs and commission to which the Clerk of the Court may be entitled for paying out such monies to the persons who may be then entitled to receive the same; that the plaintiff and each of the gas consumers be afforded excess to the books and records of the company for the purpose of checking such statement, and that they may be permitted such time as may be reasonable within which to call any errors in such statement to the attention of the Court.

4. For judgment for all its costs in and about this suit expended and for all other necessary or proper relief.

Ed B. Levee, Jr., City Attorney, Ben E. Carter, Attorneys for Plaintiff.

[fol. 284] *Duly sworn to by Ed. B. Levee, Jr. Jurat omitted in printing.*

Exhibit "A" not copied as it is the same as Exhibit "A" in Item 9.

Exhibit "B" not copied as it is the same as Exhibit "A" in Item 1.

Exhibit "C" not copied as it is the same as Exhibit "B" in Item 1.

[fol. 285] **EXHIBIT "D" TO PETITION**

Resolution

Be it Resolved by the City Council of the City of Texarkana, Texas:

The Council finds that on November 3, 1933, the Southern Cities Distributing Company filed with the City Secretary

an instrument in writing styled "Notice and Application of the Southern Cities Distributing Company for Change and Modification of Rates to go into Immediate Effect." Said Company stated in said notice that it would place the proposed increased rates into effect on November 23, 1933. On June 13, 1930, the City Council of this City passed an Ordinance in the nature of a franchise contract, whereby it granted certain increased rates to the Southern Cities Distributing Company and in consideration of said grant said company made certain contracts with the City. This franchise contract was accepted and agreed to by said Southern Cities Distributing Company by an instrument in writing dated June 17, 1930, and filed with the City Secretary on June 18th, 1930.

Said franchise contract contained among other provisions an agreement on the part of said Southern Cities Distributing Company, which was set forth in Section VIII-A, that before the Southern Cities Distributing Company, its successors or assigns should thereafter make an application for an increase in rates it should give to the City one year's notice in writing of its intention to so apply for an increase [fol. 286] in rates and that no application for an increase in rates shall be acted upon or considered unless said one year's notice be first given.

Thereafter, on November 4th, 1933, said Southern Cities Distributing Company filed with the City Secretary its motion for a preliminary hearing and action on its application, in which motion it alleged that it was being subjected to daily confiscation and asked the Council for an immediate hearing.

Thereafter, on the 14th day of November, 1933, the City Council passed a resolution in which it recited that it was willing, if proper information be submitted to it, but without waiving any of its rights under said franchise contract, to consider the question whether the provisions of said contract were oppressive or unjust and whether it should waive the same and calling upon said Southern Cities Distributing Company to furnish the proper information from which the Council would determine said question.

In partial compliance with said demand of the Council the Southern Cities Distributing Company has filed certain information with the Council.

The Council also finds that by agreements entered into between the Southern Cities Distributing Company and the City attorney, the time for said hearing has been extended from time to time and that the Council met and heard the evidence introduced by the parties on January 22nd, 1934, [fol. 287] and having heard all the evidence, does hereby make the following findings with reference to the question as to whether it should waive the provisions of said franchise agreement and consent to consider an application for increased rates without said one year's notice and with reference to the propriety of the increased rates and charges proposed by the company and the Council does adopt and make the order hereinafter set out with reference to said application.

Findings

The Council in consenting to hear said application and in considering the evidence submitted, has not waived the provisions of said franchise contract providing that no application for an increased rate should be considered except after one year's notice, but has at all times insisted on the same and has entered into this hearing and has considered said evidence for the purpose of determining whether or not the facts as to the earnings and expenses of said Southern Cities Distributing Company are such as should cause the Council to consider the provisions of said franchise agreement to be so oppressive that the Council should in equity and good conscience consent to waive the same.

The Southern Cities Distributing Company, hereinafter referred to as Gas Company, buys its gas at the City gate of Texarkana, Texas, from the Arkansas Louisiana Pipe Line Company, which company, together with the Reserve [fol. 288] National Gas Corporation, either produces all of said gas, or purchases a part of the same from independent companies, and transports the same through pipe lines to the City gate where the same is delivered and sold to the Gas Company. The Arkansas Louisiana Pipe Line Company and the Reserve Natural Gas Corporation are hereinafter referred to as the Pipe Line Companies. Both the local gas company and also both of said pipe line companies are owned and controlled by the Arkansas Natural Gas Corporation. The Arkansas Natural Gas Corporation in turn is substantially owned and is actually controlled by the Cities Service Company. The Cities Service Company is

managed and for all practical purposes is controlled by Henry L. Doherty, doing business as Henry L. Doherty & Company.

The first item which the Council has considered in determining whether the proposed rates and charges are just and reasonable, is the cost to said Pipe Line Companies of the gas which they deliver to the City gate at Texarkana for sale to the local gas Company and distribution by it. The testimony offered on behalf of the Gas Company indicates that the total annual operating expenses for the year 1930 of the Pipe Line Companies, not including depreciation, return on investment and the amount claimed for Federal income tax on such rate, is \$4,098,670.11, included in this total is the cost of gas is produced and the amortization of the cost of the gas wells, and also the expenses incurred in the operation and maintenance of said production properties, including severance taxes and royalties and taxes on the [fol. 289] gas producing properties and the general expenses of producing such gas. Said total also included all costs chargeable for gas purchased. Said cost also include the total cost of transporting gas from all of the wells of the companies, and from all of the points at which the same is purchased to all of the points at which said pipe line companies deliver gas for sale to all persons, including local distributing companies and all customers served by the Pipe Line Companies off of their own lines; including the operation and maintenance of compressor stations and the general expenses connected with the operation, maintenance, and supervision of said transportation properties. Said total also includes all of the total taxes paid on said transportation system and properties. Said total expenses claimed by the company also includes all other taxes paid by it of every kind whatsoever except federal income taxes, none of which were actually paid by any of the companies involved in this matter within the period covered by the evidence offered. Said total also includes all expenses claimed by the Company in exploring and searching for gas. The Council finds that said figure of \$4,098,670.11 includes all of the costs and expenses of every kind and description claimed by the company as the cost of producing, purchasing and transporting gas to all of the points on its pipe line system where it delivers gas, excepting depreciation and return on its investment, and that there is included in this amount the amortization charges claimed to be necessary by the com-

[fol. 290] pany to reimburse it for the cost of its gas producing property of every kind.

The Council finds that no evidence has been presented to it from which it can find that the following items of expense are fair or just or reasonable or proper charges against the consumers of gas and that they should not be included in the expense of the Pipe Line Companies which are chargeable against the present consumers of gas from said companies.

(a) In 1930 the Pipe Line Companies paid to Henry L. Doherty & Company the sum of \$51,587.86 under a management contract, copy of which has been introduced in evidence. Similar payments were made in 1931 and 1932. This contract provides in general terms for the rendering of certain services by Henry L. Doherty & Company under this contract, and the witnesses for the Company have testified that they have no information as to the cost to Henry L. Doherty & Company of any service which might have been rendered by it. The Council therefore finds that this item included in the total of expenses has not been justified and that there is not therefore any basis upon which the Council should find that the same should be allowed as a part of the expenses to be charged against the consumers.

(b) In 1930 the Pipe Line Companies paid for rentals on non-producing gas leases, the sum of \$66,042.50, and same is included in the operating expenses charged by the Com-[fol. 291] panies. The evidence indicates that these leases are wildcat leases and that they are so denominated upon the evidence submitted by the Company. They are not presently used or useful in the production of gas for the present consumers of the companies. A considerable part of them are located in Mississippi, more than 100 miles away from the nearest pipe line of these companies. The testimony of the Company indicates that the pipe line system is now far from completed. It also indicated that the Company has reserves of gas under its present producing leases which are adequate to supply its present requirements for approximately five (5) years. The Council can not find under the evidence, that these wildcat leases are now in use as a part of the gas producing properties of the Pipe Line Companies, or that said properties are at this time either used or useful to any of the present customers of the Companies. They were acquired and are being held for the use

of customers whom the Companies hope to serve at least five (5) years in the future, and the Council finds that the cost of carrying these properties, same being the rentals included in this item, should be carried by the Companies and charged against the consumers who may eventually use them in the event they become used and useful.

(c) The Companies have included in their expense an item of \$63,666.28 for the amortization of the cost of non-producing leases. The Council finds from the evidence that [fol. 292] the costs here referred to do not relate to the cost of leases which have been drilled and proven to be non-productive, but that they are the cost of acquiring the wildcat acreage above referred to. The Council finds that this item should be treated in the same manner as the rentals on non-producing leases above considered and that the same are not costs incurred in connection with property now used or useful to the present consumers of gas and that the same should not be included in the operating expenses charged against the present consumers.

(d) The Company claims as an item of expense the sum of \$24,191.47 on account of bad debts and adjustments. The Council finds that \$24,000.00 of this item is an accrual on the books for bad debts and that the actual debts charged off were \$22,264.47, and that the excess of the amount accrued over the amount actually charged off, amounting to \$1,735.53, is not properly chargeable as an expense against the consumers and should not be allowed.

After these items of expense, which the Company has not justified, have been deducted from the expenses charged by it for the year 1930, there remains the sum of \$3,947,247.21 which the Council finds is apparently justified as the total expenses to the Pipe Line Companies for the year 1930 for producing and purchasing and transporting all gas handled by it to all points of distribution on its system and that this [fol. 293] sum includes amortization of all of the costs of its gas producing properties.

Annual Charge for Depreciation

The Company claims that it should be allowed an annual amount for the depreciation of its transmission and general property, not including production property the cost of which is amortized through the expense accounts of the Com-

pany as above set forth, in the sum of \$1,306,629.08, which the Company claims should be charged against the cost of the gas distributed by it. This depreciation charge is at the rate of five (5) per cent per annum on all the claimed value of the transportation and general property of the Pipe Line Companies amounting to \$26,132,581.53. As to this claim the Council finds first that the rate of depreciation upon which it is based is not justified by the evidence which has been offered.

The engineers of the Company who inspected the transportation properties of the Pipe Line Companies for it to ascertain its condition per cent, testified that more than 60% of the transportation property was constructed within the last five years and that the condition per cent of this property was 98%, and that if it were properly maintained it might be there for one hundred years or forever. The total depreciation deducted by the Company from the cost of reproduction new of its entire property, determined by it after an actual inspection by its own engineers, amounts to between 11 and 12 per cent of the cost of reproduction new. [fol. 294] Approximately 40 per cent of the properties are considerably more than five years old. The Council finds that the annual amount charged by the Pipe Line Companies on their books for depreciation for the year 1932 was \$836,932.00, and that the annual charges on the books during the three years covered by this investigation averaged \$929,800.00 per year. For the Arkansas Louisiana Pipe Line Company the average annual net charges against the depreciation reserve amount to \$224,987.00. The net balance now remaining in the replacement reserve of the two companies as accumulated on their books amounts to \$9,159,969.00, which sum amounts to approximately thirty-one (31) per cent of the value claimed by the Company for all of the depreciable property owned by it. The plant investment account carried on the books of the two Pipe Line Companies amounts to \$33,659,162.00. Included in this plant investment account are \$5,500,000.00 for an item of gas rights which the witnesses for the Company did not know anything about, except that they were not now in existence, and an item of \$2,000,000.00 classified as "suspended" which no witness for the Company knew anything about. There is also included in the plant investment account the sum of \$486,531.00 as dry-well drilling expense, which the Company now claims should be allowed to it in its expense accounts.

When these items are deducted from the present investment account on the books of the Company, there remains the sum of \$25,672,631.90, which represents the book value [fol. 295] of the properties as far as it can be ascertained on the books. The net amount remaining in the depreciation reserve on the books of the Company, as above pointed out, amounts to \$9,159,659.00.

In consideration of the evidence which has been presented before the Council concerning the experience of the Company as to depreciation, it finds that a higher rate for the annual depreciation charge than two per cent (2%) has not been justified and that two per cent (2%) would be an ample and liberal allowance insofar as shown by the evidence before the Council. The amount of this allowance is \$482,651.63, same being two per cent (2%) upon the value of the depreciable property as hereinafter found.

Included in the items of expense claimed by the Company, and not stricken out by the Council as being unjustified on the basis of the evidence presented to it, is a considerable amount of expense items charged to the Pipe Line Companies by the Arkansas Natural Gas Corporation. There was some testimony as to the general nature of the services performed by the Arkansas Natural Gas Corporation. This Corporation, besides owning these gas properties, owns a controlling interest in and manages a considerable number of other properties including companies engaged in the production, refining and marketing of oils, gasoline, lubricating oils and also a company engaged in the distribution of automobile tires. The witnesses offered by the Gas Company in this case testified that they did not know the basis on [fol. 296] which these expense items were allocated by the Arkansas Natural Gas Corporation to its various subsidiary companies. There is no evidence whatever in the record as to what method was used to apportion the costs to the subsidiary companies and there is no evidence from which the Council could find that the expense items allocated against these gas properties represent either the cost or the proper proportion of the cost to the Arkansas Natural Gas Corporation of the services, materials, supplies or other basis upon which these charges were made. The Council has not, however, deducted these costs so allocated to the gas properties on some basis unknown to the witnesses, because these items are indefinite and incapable of

determination from the evidence. They represent, however, a considerable item of expense which has been allowed to remain in the expenses claimed by the Companies but which have not been justified by any evidence before the Council.

Rate Base

The Pipe Line Company claims that the present fair value of the property upon which it is entitled to earn a return is \$36,616,007.84.

Aside from the facts above recited as to the plant investment account shown on the books of the Company there is no evidence in the record as to the original cost to date of the properties of the Pipe Line Companies. The testimony of the Gas Company was that the plant investment account referred to did not accurately reflect the original cost of [fol. 297] construction. This account is said to include items taken over from the books of predecessor companies and also to include additions to the properties since 1928.

The figure claimed by the Company for its rate base represents what it claims to be the cost of now reproducing the pipe line properties less accrued depreciation determined by an actual inspection of the properties to determine their condition per cent. The engineer who made this investigation testified that he inspected the pipe lines at some four hundred places. The pipe lines thus inspected are over 96 miles long. The engineer testified that he inspected approximately six to eight feet at each of the four hundred points of inspection.

This engineer testified that he gave no consideration whatever to the expired service life of the property, or to the anticipated future service life, but did base his estimate of condition per cent upon the appearance of the pipe inspected by him and whether it was pitted or not.

The gas producing properties, including the operated leases, and the gas wells thereon and the materials in the wells were not depreciated at all. The producing leases were included in the rate base by the Company at a figure said to represent their actual cost. The wells on these producing leases were included in the valuation at a figure said to represent their cost of reproduction new. Neither of these items was depreciated or depleted. Some of these [fol. 298] wells have been producing gas for many years

and the testimony shows that some of them are nearing complete exhaustion and that some of them are completely exhausted every year. The Council finds that a well which is nearing exhaustion does not have the same value as a new well drawing gas from undepleted reserves. The Company claims in its exhibits an expense item for the amortization of the cost of drilling and equipping these gas wells. The total so claimed for the years 1930, 1931, and 1932 as such expense item amounts to \$734,882.00. In comparing this expense item claimed for the last three years with the cost of reproduction new of the gas wells claimed by the Company at the figure of \$1,523,306.48, the Council finds that the claim of the Company that the present value of these gas wells is as great as the cost of reproduction new is not justified and cannot be sustained.

In determining the rate base the Council has included these wells at the present value claimed by the Company, which is the reproduction cost new, because the evidence does not show the basis on which this item should be depreciated but the Council finds that this property is included at considerably more than its present value and that it should be depreciated.

While the Council finds that the present value claimed by the Company is not, for the reasons above set forth, fully justified and that the Company has not discharged the burden of proving the present fair value of its properties upon which it claims a return, and while the Council finds that [fol. 299] the value so claimed by the Company is excessive, nevertheless the Council adopts this value as the maximum value upon which the return should be calculated.

There are included, however, in the rate base claimed by the Company certain specific items which the Council finds have not been justified at all by the evidence offered before it and which must be stricken out in determining the fair value of the property. These items are the sum of \$986,725.05 as being the actual cost of non-producing leases. These are the leases designated on the exhibits of the Company as wildcat acreage. The rentals on these leases have been heretofore discussed. These leases are not now used or useful in supplying gas to the present consumers of the Company and a return upon their value or cost can not be included in the value of the property upon which the consumers should be forced to pay a return upon the theory

that it is now used or useful in performing any service to them.

There is also included an item of \$2,000,000.00 as present value of contractor's profit on labor in the construction of the transportation system. It is testified that this item represents 20% of the labor costs. The Council finds that if any such item is property included in the rate base at all the amount of this item is at least twice as much as contractors profits figured in this part of the country at the present time. The Council finds, however, that the Company has included in other items all of the costs of superintendence, supervision, engineering, accounting, purchasing [fol. 300] and other services such as are rendered by the contractors, and that an allowance of any separate amount for contractor's profit would duplicate other cost items already included in the rate base and that this item should be struck out in its entirety. The witnesses for the Company testified that their cost of reproduction new was based upon the unit cost system and that the unit cost system included all of the items of cost of the property in place, reflecting the cost of reproducing the property as it existed on the date of the inventory. In addition to those unit costs, which according to the Company's testimony, represented the cost of the property in place, the Company has claimed an item of over \$4,000,000.00 as representing the cost of the engineering overhead. The Council therefore finds that the evidence submitted to it does not justify the inclusion of a separate item of \$2,000,000.00 representing contractor's profits and that this item should not be included in the rate base.

There has also been included in the rate base claimed by the company the sum of \$4,267,120.80 for what is denominated as "going concern value."

The witnesses for the company testified that this amount consisted principally of depreciation and interest on idle plant after it was built and before consumers could be attached to it and also consisted of the cost of training men to operate the plant. They also included taxes on the plant during the time it was idle along with the depreciation and interest. The testimony reflects that by far the largest part [fol. 301] of this plant was built after contracts had been secured for certain gas delivery and was built for the express purpose of meeting the requirements of these con-

tracts and that this property did not have any such period of idleness as is called for in the testimony of the Company's witnesses. Over sixty per cent of the plant was built after the latter part of 1928 and the greatest amount of gas distributed by the company occurred in January, 1930, and the witnesses for the Company testified that the load reached the theoretical capacity of the plant at that time. This Company is and has been since the time of its organization a large operating unit with a great number of trained men in its own ranks. There is no evidence on which the Council should find that this company ever did or ever would go out and hire untrained personnel to operate its properties and the cost of training an operating personnel is not a cost which has been incurred in the construction of this plant. In addition to that, any expenses which have been incurred in training employees have been charged as operating expenses and presumably returned to the Company through expenses in the past, just as the cost of training new men at the present time is now being charged through the operating expenses of the Company. In addition to the fact that the Council has not placed a scrap value upon this property and has valued it as a going plant, the Council has included other elements for a going concern value by including in the value claimed for the rate base the full cost of producing leases claimed by the Company [fol. 302] without any depreciation and the full value claimed by the Company for the cost of reproduction new of its gas wells without any depreciation, both of which values, as has been heretofore pointed out, are largely in excess of the actual present value of these two classes of property. In allowing full value claimed for these items, the Council has considered the item of going concern value for the property as a whole.

In placing a value upon the plant of the Company, the plant is valued as a going concern and not at its junk or scrap or salvaged value. The compressor stations which are included in the value at a large figure would have no value except a comparatively small junk or scrap value except for the Pipe lines which connect them and which also cannot with the producing gas wells and with the consumer. The pipe lines, which have been included in the value at a very large figure, would have only a comparatively small scrap value if it were not for the gas wells at one end and

the customers at the other. The producing leases and the gas wells which have been included in the value at a large figure would have almost no value at all if it were not for the pipe lines which — them with the consumers. In the valuation placed upon the property it has been valued as a going concern and an allowance for going concern value is included in the value which has been allowed. The specific item claimed by the Company for going concern value, comprising the matters above discussed, has been disallowed on the ground that none of the matters discussed [fol. 303] was an item of expense incurred in connection with the construction of this property.

The Company claims that there should be included in its rate base the sum of \$1,404,382.06 for working capital. The Council finds that the maximum amount which can be reasonable included for working capital is the sum of \$500,000.00. On the December, 1932, balance sheet submitted by the Pipe Line Companies, the total amount of customers' accounts receivable, of stores and supplies, and of cash, and accounts receivable from affiliated companies, amounted to \$358,634.16. The Council finds that this was the actual working capital upon which the Pipe Line Companies were operated in December, 1932.

The Council also finds that the total 1932 expenses of the two Pipe Line Companies were approximately \$3,000,000.00. A reasonable allowance for working capital would be the expenses for a period of somewhere between forty-five and sixty days, certainly not to exceed sixty days. The expenses for a forty-five day period would be \$373,000.00. The expenses for a sixty day period would be \$500,000.00. This is the maximum working capital upon which the pipe line company should be allowed to charge a return against the consumer. When it is compared with the actual working capital which was employed in December, 1932, the Council find that an allowance of \$500,000.00 for working capital is the maximum which should be included in the rate base.

[fol. 304] The Company also claims that there should be included in the rate base the sum of \$1,123,505.65 for the cost of financing. As the Council understands the evidence, this item represents the costs that the Company considers will be necessary to induce bankers to finance the construction of the property, or to interest capital to advance the

funds necessary to construct the property. If the base value considered is the present value, that value must be measured by money and the cost of obtaining money is immaterial. The company is entitled to a fair return on the capital which it shall prudently invest in the enterprise and no more. This cost of financing is claimed on the theory that a company desiring to build such a plant as this would come here penniless or without sufficient capital to pay for the plant and would be compelled to incur certain costs in order to interest capital in the enterprise and in order to float securities to pay for it. The Council finds that the value of the plant, if the theory of reproduction cost new is to be used, should be determined upon the theory that it would be built by those able to build it and that they would pay reasonable prices for it. The Council also finds that this item has been held to be an improper item for inclusion in the rate base by the United States Supreme Court in the case of *Galveston Electric Company v. Galveston*, 258 U. S. 388, and also by other Federal Courts. In the face of these decisions the Council can not find any justification for including it in the value upon which the company should be allowed to earn a return from the customer.

Summary of Rate Base

After the adjustments above set forth have been made on the value claimed by the Company as the basis on which it should be allowed to earn a return, the Council finds that the fair value of all of the property of the Pipe Line Companies now used and useful in supplying gas to the present customers of the Pipe Line Companies is not in excess of the sum of \$27,334,274.28.

Rate of Return

The company claims that it should be allowed to earn a rate of return amounting to at least eight per cent (8%) upon the value of its transmission and general property and ten per cent (10%) on its production property.

The Council takes judicial knowledge of the business conditions which have prevailed in this section of the country during the last four years and it also knows that few businesses in this section of the country which are exposed to competition, and which do not enjoy monopoly, and which

are exposed to the risks of falling and rising prices, have been able to earn any return at all since 1929. The Council also takes judicial knowledge of the fact that very few businesses of any character and very few investments of [fol. 306] any character in this section of the country have earned anywhere near as much as six per cent (6%) on the money invested.

In considering what should be a fair rate of return, consideration must be given to the fact that this Pipe line property was designed and constructed to produce and transport a considerably larger amount of gas than is now being produced and transported. The company's witnesses testified that the peak load in January, 1930, was the theoretical capacity of the plant. This load amounted to 168,912 m. c. f. The peak load in 1933 came in the first part of February and amounted to 139,143 m. c. f. The witnesses for the company also testified that most of the sixty per cent (60%) of the plant which had been built since 1928, was built mainly to meet the requirements of certain industrial gas contracts which they had before the lines were built. The figures submitted by the Company show that the industrial peak load in 1930 was 83,614 m. c. f., and that the industrial peak load in 1933 was 38,348 m. c. f.

It also appears that the total gas distributed by the Pipe Line system in 1930 was 55,681,572 m. c. f., that the total for the year 1932 was 43,380,345 m. c. f., and that the total for the first six months of 1933 was 21,463,189 m. c. f. The fact that some customers ceased using gas and that others used less gas than they formerly did does not increase the value of the service rendered to those customers who are still using gas. These remaining customers are being re-[fol. 307] quired to pay all of the operating expenses and all of the depreciation on the value of the plant, both of which expenses should be spread over the greater number of customers for whose benefit the plant was designed and built. There would appear to be no justification for asking these remaining customers to pay a rate of return greater than the lowest reasonable rate.

The council therefore finds that under the present depressed and abnormal conditions when the earnings of the best organized and best financed concerns of the country are decreased and when many of them are not earning operating expenses, and when the present consumers are be-

ing asked to pay a return upon the full value of a plant designed and capable of serving a far larger consumption than is now being served, which plant was largely built to meet the requirements of industrial contracts, which the evidence of the company shows have in a large part temporarily evaporated, that a rate of return in excess of six per cent (6%) would be exorbitant and excessive and unfair to the consumers of the Company.

The testimony of the witnesses also shows that the Company is getting its money for six per cent (6%). The evidence of the Company also indicates that its business is developed to the point where it can no longer be classed as a hazardous or risky business. The figures with reference to the plant investment account of the Pipe Line Companies and the amounts which they have accumulated for surplus and replacement reserves on their books have already been [fol. 308] cited and these records indicate that the surplus and reserves amount to almost one-third of the amount invested.

Under the evidence submitted in this case, the Council can find no justification for allowing a greater rate of return than six per cent (6%).

Applying this rate of return to the rate base as found by the Council of \$27,334,274.28, the maximum amount which the Company should be allowed to earn as a fair rate of return on the value of its property is \$1,640,056.46.

As was stated at the beginning of those findings, most of the figures as to expenses hereinabove set forth were for the year 1930; similar evidence has been introduced as to the expenses for the years 1931, 1932 and they have been similarly considered by the Council, and the Council has reached as to them similar results.

As a result of the consideration of the evidence submitted by the Company and as a result of the adjustments in the expenses, valuations and returns claimed by the Company, the Council finds that the total fair, just and reasonable expense of the Pipe Line Companies, including depreciation and a return on the rate base, incurred in the cost of producing, purchasing and transporting gas to all the points on its system were not in excess of the following amounts:

For the Year 1930	\$6,062,955.30
For the Year 1931	5,526,123.30
For the Year 1932	5,114,377.13

[fol. 309] Southern Cities Distributing Company

The local Gas Company claims that the total cost to it of serving its customers in Texarkana, Texas, was as follows:

For the Year 1930	\$396,330.54
For the Year 1931	363,140.79
For the Year 1932	327,087.46

Included in these totals were certain items for rate case expense incurred in connection with the rate controversy which has been decided adversely to the claims of the Gas Company. The Council finds that these items of expense are not properly chargeable against the consumers and should be stricken out. They are:

For the Year 1930	\$7,917.91
For the Year 1931	1,659.06
For the Year 1932	1,944.32

There is also included in these totals as an item of expense the amount paid Henry L. Doherty & Company under contracts similar to that hereinbefore referred to, which items are as follows:

For the Year 1930	\$5,377.52
For the Year 1931	5,366.21
For the Year 1932	4,575.07

There is no evidence in the record either as to the specific services rendered by Henry L. Doherty & Company and the witnesses for the Company did not know what it cost Henry L. Doherty & Company to render such services as [fol. 310] might have been performed. These items are therefore stricken out.

There is also included the cost of gas. The proper allowance for the cost of gas is hereinafter determined and added back and the Council therefore finds that in computing the proper expenses of the Company, aside from the cost of gas, this item should be stricken out. This leaves expense items, aside from the cost of gas, properly chargeable against the consumers, as follows:

For the Year 1930	\$67,404.53
For the Year 1931	57,241.06
For the Year 1932	47,829.47

Included in these totals are a number of items allocated down to the Texarkana plant and then to the consumers in Texarkana, Texas, from the Southern Cities Distributing Company. This allocation was made on the basis of the number of meters. There is no evidence that this basis accurately reflects on has any necessary relation to the actual cost of rendering such services as may have been rendered to the consumers in Texarkana, Texas. In addition to this, the testimony of the Company's witnesses shows that a considerable part of these expense items had been allocated down to the Southern Cities Distributing Company from the Arkansas Natural Gas Corporation upon some basis unknown to the witnesses. The expenses which have been allowed, therefore, include a considerable amount which has not been justified by the evidence but the Council does not [fol. 311] strike them out because there is no evidence in the record upon which the Council can determine what is the proper basis of allocation.

To the expenses which have been above allowed there should be added the item of Bad Debts which is as follows:

For the Year 1930	\$1,817.00
For the Year 1931	4,473.54
For the Year 1932	3,421.68

The cost of gas must also be added to the above expenses. The Council has heretofore set forth what it finds to be the total expense to the Pipe Line Companies for all their services incurred in supplying gas to all points on their systems, including depreciation and a return upon the fair value of their property. The Council finds that the fair and reasonable method of charging against the Texarkana, Texas, consumers their proportionate part of these total expenses of the Pipe Line Companies and the return upon their properties is in proportion to the total gas sold to domestic, commercial and industrial consumers in Texarkana, Texas, as compared with the total gas sold by said Pipe Line Companies to all consumers. These proportions are:

For the Year 1930	2.29427%
For the Year 1931	2.63562%
For the Year 1932	2.38220%

Applying these percentages to the total expenses, including a return, of the Pipe Line Companies shows the

[fol. 312] following amounts as the proper cost for gas delivered by the Pipe Line Companies to the Texarkana, Texas, distributing system:

For the Year 1930	\$139,261.16
For the Year 1931	145,647.60
For the Year 1932	121,834.69

To the expenses and the cost of gas there must be added a fair allowance for the depreciation on the properties used and useful in supplying gas to the consumers in Texarkana, Texas, and a return upon the fair value of this property.

The Company claims that the rate base upon which it should be allowed to earn a return in Texarkana, Texas, is \$518,252.37. Included in this is a specific item of \$60,000.00 for Going Concern Value. This specific item the Council finds is not justified for reasons similar to that set forth under discussion of similar claim of the Pipe Line Companies. The Council has considered the fact that the property is a going concern connected with a source of gas at one end and with established customers at the other end, and has taken that item of value into consideration. The Council also finds that the land included in the value claimed by the company is in excess of its present value. The Council has allowed something for Going Concern Value in allowing these two items to remain in the rate base at the figure claimed by the Company. The Council also finds that included in the separate item for Going Concern Value claimed by the Company is the cost of connecting customers with the line. As a matter of history, this expense has been charged currently to operating expenses. The same is true as to the cost of training and organizing and the cost of developing the books and records which the company claims should be included in the item of Going Concern Value. In the actual experience of the Company the cost of maintaining an idle plant and the cost of taxes and interest has been absorbed in operating expenses and the Council takes knowledge of the fact from personal observation that the Texarkana, Texas, plant has been built piece-meal and that extensions have been made to meet demands.

There is also included by the Company in the rate base claimed by it the sum of \$20,000.00 for the cost of financing.

This is excluded by the Council for the same reasons as set forth in the discussion of the Pipe Line Companies.

The exclusion of these items leaves a rate base of \$438,252.37 which the Council finds is the maximum possible amount of the fair value of the property in Texarkana, Texas, upon which the Company is entitled to a return.

The depreciable items set forth in the cost of reproduction new, before the accrued depreciation is taken out, amount to \$464,535.31. The Council finds, for the same reasons set forth under the discussion of the Pipe Line Companies, that the proper annual charge for the depreciation of this property is two per cent and that the annual charge [fol. 314] for depreciation is \$9,290.71. Much of the property in the Texarkana, Texas, distributing plant was installed by the old artificial gas system prior to 1905. The engineers for the Company testified that the condition per cent of the property is better than 85%. The engineer inspected, at the time of the hearing, some mains which had been laid by the Southwestern Gas & Electric Company prior to the purchase of these properties in 1928 and found them to be in 98% condition.

The Council finds that a fair rate of the return upon the present maximum value of the property used and useful for distributing gas in Texarkana, Texas, is 6%, being the same rate of return found for the Pipe Line properties. This return applied to the maximum value of the rate base is \$26,295.14.

When these items of Paid Debts, Depreciation, Return on Rate Base and Cost of Gas, as above determined, are added to the other expenses hereinabove set forth, they show that the total cost of the gas delivered by the Distributing Company to its customers in Texarkana, Texas, was as follows:

For the Year 1930	\$244,068.54
For the Year 1931	242,948.05
For the Year 1932	208,671.69

In determining whether the rate applied for by the Company is a proper rate, the Council deducts from the above totals of the cost of gas delivered by the Distributing Company, including a return, the income from industrial sales, [fol. 315] the forfeited discounts and other income. The totals of these were as follows:

For the Year 1930	\$112,896.31
For the Year 1931	110,105.10
For the Year 1932	80,593.04

These deductions leave the following amounts as the total of the costs and return which may be fairly charged against the domestic and commercial consumers in Texarkana, Texas:

For the Year 1930	\$131,172.20
For the Year 1931	132,842.95
For the Year 1932	128,078.65

When these totals are divided by the total sales to domestic and commercial consumers they show that the total cost, including depreciation, return and all other costs of the gas sold by the Distributing Company to domestic and commercial consumers, were as follows:

For the Year 1930	30.789¢ per M. C. F.
For the Year 1931	33.546¢ per “
For the Year 1932	35.927¢ “

The Council also finds that the average costs per M. C. F. of all gas sold by the Distributing Company in Texarkana, Texas, were as follows:

For the Year 1930	23.825¢ per M. C. F.
For the Year 1931	23.164¢ “
For the Year 1932	25.935¢ “

[fol. 316] These costs include not only all expenses actually incurred by the Pipe Line Companies and the Distributing Company in producing, purchasing and transporting this gas but they also include the depreciation on all the properties involved, a return upon the maximum fair value of the property used and useful in supplying such gas, and the amortization of the cost of the producing leases and of the cost of reproduction new of the gas wells from which the gas is obtained.

No allowance has been made by the Council for Federal Income Taxes upon the returns claimed by the Pipe Line Companies and the Distributing Company. It is in evidence that no income taxes have been paid during any of the three years covered by the evidence offered to the Council. In this connection the Council points out that it called upon the

Gas Companies for information covering all these matters for five years prior to this date and that at the request of the Gas Companies it modified its request to cover only three years. These companies filed consolidated income tax returns with Arkansas Natural Gas Corporation, a Company which is engaged in many other lines of business besides producing and transporting gas. As a result of these affiliations and the consolidated income tax returns filed in connection therewith, these gas properties have not paid any income taxes to the government nor have they been called upon to do so, nor is there any evidence that there is any immediate prospect that they will have to pay such taxes.

[fol. 317] The Council finds that there is no justification for calling upon the consumers to pay income taxes which the Companies themselves do not pay and it has not therefore made any allowance for the charge of such taxes against the consumers.

The Council finds that the Southern Cities Distributing Company is now collecting from its domestic and industrial consumers in Texarkana, Texas, the rates set up in the franchise contract entered into between the Company and the City in June, 1930, which rates are a minimum monthly rate of \$1.00, which minimum is not subject to any discount and for which the consumer is entitled to receive one thousand feet of gas and that all gas consumed after the first thousand feet is charged for at the rate of fifty cents per thousand, which rate is subject to a discount of five per cent (5%), resulting in a net rate of forty-seven and one-half ($.47\frac{1}{2}$) cents per thousand cubic feet.

The Council finds that at no time covered by the information and evidence submitted to it by the Company was the cost to the company of the gas sold to domestic and commercial consumers in excess of 35.927 cents per thousand cubic feet which cost includes all expenses for producing and purchasing the gas and amortizing the cost of the leases from which it is produced and the cost of drilling and equipping the gas wells and also includes all of the costs and expenses incurred by the Pipe Line Companies in bringing the gas to Texarkana, including depreciation on their properties and a fair return upon the value of all of said [fol. 318] producing and transportation properties and also

includes all the expenses incurred in distributing the gas in Texarkana, including an allowance for depreciation upon the property used in such distribution and a fair return upon the value of such property.

The Council also finds that the legal rate which should be in effect in Texarkana, Texas, at the present time under the terms and provisions of the franchise agreement entered into in June, 1930, is fifty cents per thousand cubic feet, which return is subject to discount of ten per cent resulting in a net return of .45¢ per thousand cubic feet. Under the terms of said franchise agreement the Company bound itself to place in effect in Texarkana, Texas, any rate which it might be compelled to place in effect in Texarkana, Arkansas, and said company has been, by an order of the United States District Court for the Western District of Arkansas, compelled to place said forty-five cent rate in effect in Texarkana, Arkansas, and said rate is the one which said Company is bound under said franchise agreement to use in Texarkana, Texas. The Council finds that said forty-five cent rate is in excess of the cost, including depreciation and return, of supplying gas to the domestic and commercial consumers in Texarkana, Texas.

The Council finds, therefore, that no reason exists for finding that the provisions of the franchise contract, whereby the Company agreed that no application on its part for an increase in rates should be heard or determined until after [fol. 319] one year's notice are oppressive or unjust and that no reason exists why the Council should waive said agreement on the part of the Council and the Council finds that it should not waive said agreement.

The Council finds further that if there was no such agreement, the Company has not submitted evidence from which the Council could find that the rates now being collected by the Company do not fully compensate it for all the services performed by it for its consumers in Texarkana, Texas, or, from which the council could find that the present legal rate of forty-five cents net is not a fair and just and reasonable rate or could find that said rate does not fully compensate said company for all its expenses or that said rate does not allow to said Company more than a fair rate upon the full value of its properties, in addition to paying all of said expenses and paying for the depreciation on the property used in rendering said service.

The Council finds that an order should be made directing the Gas Company not to put the proposed increased rates into effect and forbidding them from doing so.

Order

Now, therefore, be it further resolved by the City Council of the City of Texarkana, Texas :

1. That the Council refuses to waive and still insists upon the provision of the franchise agreement entered into in June, 1930, wherein the Southern Cities Distributing Company [fol. 320] agreed that no application for increased rates on its part should be heard or determined until after one year's notice. The City Attorney is ordered and directed to pursue and insist upon his application now pending in the Courts for an injunction to secure the specific performance of said franchise agreement.

2. That the rates for gas contained and set forth in the "Notice and Application of the Southern Cities Distributing Company for Change and Modification of Rates to go into Immediate Effect" filed with the City Clerk on November 3, 1933, are unjust and unreasonable and are exorbitant and improper rates and would result in an even greater and more unjust discrimination against the consumers of gas of Texarkana, Texas than are the rates which said company is now collecting in violation and in disregard of its franchise agreement to give to its consumers in this City the benefit of any rates it is compelled to place in effect in Texarkana, Arkansas, and said Southern Cities Distributing Company is forbidden to put such proposed new rates into effect and is ordered and directed not to put such rates into effect.

3. The City Attorney is ordered and directed to continue and to insist upon his application now pending in the Courts for an order directing said Company to comply with its franchise agreement and to place in effect in Texarkana, Texas, [fol. 321] the rates which it has been compelled to place in effect in Texarkana, Arkansas, same being the net rate of forty-five cents per thousand cubic feet hereinabove referred to, which rate the Council finds from the evidence which has been submitted to it by the Company is a rate more than sufficient to return to said Company all of its costs and expenses in supplying gas to the domestic and commer-

cial consumers and in addition thereto it provides a reasonable allowance for depreciation and pays to said Company more than a fair rate of return upon the reasonable and fair value of all of the property used and useful in rendering such services to said consumers.

4. The City of Texarkana, Texas, hereby notifies the Southern Cities Distributing Company that it will one year from this date enter upon a hearing for the purpose of determining whether or not the rate for domestic and commercial consumers should not be reduced to forty cents per thousand cubic feet or less. This notice shall not be construed as a waiver of any right on the part of the City to insist that if in the meanwhile a lower rate than the present rate now in effect in Texarkana, Arkansas, is put into effect in that City, said Company shall at once place said lower rate in effect in Texarkana, Texas, as it obligated itself to do in said franchise agreement of June, 1930.

Nothing herein shall be construed to be waived upon the part of the City of the right granted to it in said franchise [fol. 322] agreement to receive free gas for its use at the municipal building, jail and fire stations.

Passed and approved this the 23rd day of January, A. D. 1934.

(Signed) R. C. Cowan, Mayor.

Attested: (Signed) G. D. Garrett, City Secretary. (Seal of City of Texarkana, Texas.)

Exhibit "E" is not copied as it is the same as Exhibit "D" in Item 9 above.

[File endorsement omitted.]

CITATION ISSUED MAY 23, 1934

Do not copy Citation, state: "Citation issued May 23, 1934, was served on the same day."

[fol. 323] IN DISTRICT COURT OF BOWIE COUNTY, TEXAS,
FIFTH JUDICIAL DISTRICT

No. 19771

CITY OF TEXARKANA

vs.

SOUTHERN CITIES DISTRIBUTING COMPANY et al.

ANSWER OF DEFENDANT, RAILROAD COMMISSION OF TEXAS—
Filed June 11th, 1934

To the Honorable Judge of said Court:

Come now the Railroad Commission of Texas, and the members thereof, Lon A. Smith, Chairman, E. O. Thompson and C. V. Terrell, being the duly elected and qualified members at this time serving as the Railroad Commission of Texas, acting by and through James V. Allred, the duly elected and qualified Attorney General of the State of Texas, as defendants in the above entitled and numbered cause, and for answer herein say:

I

That defendants demur and except to plaintiffs' original petition and say that such petition states no cause of action as against them; that such petition is wholly insufficient to require them to answer herein, and that same is without sanction either in law or in equity, and of this exception and demurrer they pray judgment of the Court.

II

Further answering, if same be necessary, these defendants show the Court that under Articles 6050 to 6066, inclusive, [fol. 324] Title 102, Revised Civil Statutes of 1925, the powers and duties of the Railroad Commission of Texas in the regulation of gas rates within the cities and towns of this State, and of the regulation of gas utilities operating within this state, are prescribed and defined; that particularly under Article 6058 are the duties of the Railroad Commission defined in requiring such Commission to hear and try any appeal from city control, where such appeal is

brought by the filing of proper petition and bond, in cases where a city government has ordered any existing rate to be reduced or when any city Government has failed or refused to grant an increase in rates after proper application on the part of the utility, requesting such raise in rates; that under the aforementioned statutes the Southern Cities Distributing Company filed with the Railroad Commission of Texas, on March 5, 1934, a petition purporting to be both an appeal from the refusal of the City Council of the City of Texarkana to grant an increase in rates and from the action of the City Council of the City of Texarkana in passing an ordinance reducing the existing rates; that thereafter on March 12, 1934, the Railroad Commission issued an order allowing such appeal on the condition that the said Southern Cities Distributing Company give a good and sufficient bond for the protection of the consumers of domestic gas within the City of Texarkana, Texas, in the sum of ten thousand (\$10,000.00) dollars; said order provided further that upon the filing and approval of said [fol.325] bond the action of the City Council should be suspended and superseded.

Defendants show that the requirement of the Railroad Commission as to the filing of a bond and the order of the Railroad Commission, setting the amount thereof, was in strict conformity to the provisions of Article 6058, and that said Article 6058 makes the filing of said bond in the amount and manner as required by the Railroad Commission a condition precedent to the perfection of the appeal, and without which no right exists for said utilities to require a hearing and decision by said Railroad Commission.

Defendants further show that no bond has ever been filed or posted by said Southern Cities Distributing Company with the Railroad Commission in its appeal relating to gas rates in the City of Texarkana, and that this being so, its appeal is not at this time perfected as before said Railroad Commission of Texas.

Defendants further show that the Railroad Commission of Texas stands ready at this time and will stand ready in the future at all times to hear the appeal of said Southern Cities Distributing Company, if and when such appeal may be perfected by the posting of a good and sufficient bond, if said bond be provided within a reasonable time.

Wherefore, defendants pray that this Honorable Court enter such order as may be necessary in the premises, but

in this regard respectfully pray that such order as may be directed to the Railroad Commission of Texas, or the [fol. 326] members thereof, will not restrain and enjoin them from properly functioning as a regulatory body of the State of Texas, upon the appeal now pending before them, as instituted by the Southern Cities Distributing Company, if and when such appeal is perfected by the filing of a proper bond, as required by the order heretofore issued by said Railroad Commission, if such bond be furnished within a reasonable time, and for such other and further relief, general and special, in law and in equity, to which the defendants may show themselves entitled.

James V. Allred, Attorney General of Texas. A. R. Stout, Assistant Attorney General. William C. Fitzhugh, Assistant Attorney General.

[File endorsement omitted.]

NOTICE OF REMOVAL FROM STATE COURT, ETC.

“Notice of Petition and Bond for Removal to Federal Court dated June 1st, 1934, was acknowledged by Plaintiff, on June 1st, 1934.”

[fol. 327] IN DISTRICT COURT OF BOWIE COUNTY, TEXAS,
FIFTH JUDICIAL DISTRICT

No. 19771

[Title omitted]

PETITION FOR REMOVAL—Filed June 2nd, 1934

To the Honorable Judge of said Court:

Now comes the defendant herein, Southern Cities Distributing Company, as petitioner in the above entitled cause, and respectfully shows to the Court:

1

That the above numbered and entitled suit has been brought in this court and is now pending therein.

2

That said action is of a civil nature, instituted by the City of Texarkana, Texas, as a municipal corporation of the State of Texas, by bringing into issue the legal construction of the franchise under which defendant, Southern Cities Distributing Company is operating within the limits of said City of Texarkana, Texas, and seeking by injunction to deny said defendant the right to apply for an increase [fol. 328] in the rates to be charged for gas within said city to said city and consumers therein, and the right to a hearing on appeal to the Railroad Commission of Texas of its application for an increase in rates, taken from an order of the City Council of the said City of Texarkana, Texas, denying such application, and bringing into issue an order or judgment of the United States District Court of the Western District of Arkansas, Texarkana Division, relating to rates chargeable for gas in the City of Texarkana in the State of Arkansas, and seeking a judgment of the said District Court for the Fifth Judicial District of Texas forcing the defendant, Southern Cities Distributing Company, to reduce its rates in Texarkana, Texas, to those heretofore in effect in Texarkana, Arkansas; and in which said plaintiff also seeks to enjoin the members of the said Texas Railroad Commission from hearing and passing upon the said appeal of said defendant; and in which other matters and issues are presented, and all of which more fully appear from the plaintiff's said complaint or bill, and which for the purpose of showing the character of the action by the plaintiff is made a part hereof by reference to the same extent as though fully copied herein.

3.

That the value of the matter in controversy, and especially as between said plaintiff and this defendant, in said action exceeds three thousand dollars (\$3,000.00), exclusive of interests and costs.

[fol. 329]

4.

That the plaintiff's action, as a matter of fact and as shown by its allegations, involves a separable controversy as between it, a resident and citizen of the State of Texas, and the defendant, Southern Cities Distributing Company,

a resident and citizen of the State of Delaware, and is a controversy which is wholly between citizens of different states, and which can be fully determined as between them.

5.

That the plaintiff's action herein involves a controversy which is wholly between citizens of different states, in that the City of Texarkana, the plaintiff, is a municipal corporation and a body politic, incorporated under the laws of the State of Texas, wholly situated in said state, and was at the time of commencement of this suit in this court and still is a citizen of the state of Texas, and a resident of the County of Bowie in the Eastern Federal District of the State of Texas, Texarkana Division; and that your petitioner, Southern Cities Distributing Company, defendant herein, is a private corporation incorporated under the laws of the State of Delaware, with its principal office in said State in the City of Wilmington, and was at the time of the commencement of this suit and still is a citizen and resident of the State of Delaware, and was not and has not been a citizen and resident of the State of Texas.

[f. l. 330]

6.

As an additional ground showing that this suit is removable and that the controversy as to this defendant is separable, defendant states that the members of the Railroad Commission are not proper parties in this suit and should be wholly disregarded in considering whether the suit is removable.

7.

As an additional ground showing that this suit is removable and that the controversy as to this defendant is separable, defendant states that this Court wholly lacks jurisdiction and venue over those defendants who are members of the Railroad Commission of Texas, and that this suit should be treated as if it were wholly between the City of Texarkana, Texas, and this defendant, Southern Cities Distributing Company.

8.

As an additional ground showing that this suit is removable and that the controversy as to this defendant is sep-

arable, defendant shows that no action whatever is stated against the defendants who are members of the Railroad Commission of Texas for the reason that the petition is insufficient as a matter of law as against those defendants.

9

That the plaintiff's action, as a matter of fact and as shown by its allegations, involves a federal question, in [fol. 331] that it involves the construction and application of the order and judgment made and entered as alleged in plaintiff's said complaint or bill by the United States District Court for the Western District of the State of Arkansas, Texarkana Division, in that it seeks to enforce same in Texarkana, Texas, by compelling said defendant to observe and comply therewith in making charges for gas in the City of Texarkana in the State of Texas, and thereby give to said order and judgment of said federal court extra territorial force, all as shown by the plaintiff's said complaint or bill, and which with reference thereto is made a part hereof as though fully copied herein.

10

That the time within which your petitioner, Southern Cities Distributing Company, defendant herein, is required by the laws of this state, and the rules of this court, to answer or plead to the declaration or petition of the plaintiff in the above entitled action, has not expired.

11

Your petitioner, defendant herein, presents herewith a bond with good and sufficient surety, conditioned that it will enter into the District Court of the United States for the Eastern District of Texas, Texarkana Division, within thirty days from the time of the filing of this petition and with said bond a certified copy of the record in this suit, [fol. 332] and that it will pay all costs that may be awarded by said United States District Court in case said court shall hold that suit was wrongfully or improperly removed thereto.

Wherefore, your petitioner prays that this court proceed no further herein, except to accept said surety and bond and by order cause the record herein to be removed into said

District Court of the United States within and for the Eastern District of Texas, Texarkana Division of said court, according to the statute in such cases made and provided.

Southern Cities Distributing Company, Petitioner,
by H. C. Walker, Jr., and W. H. Arnold, Jr., Arnold
& Arnold, King, Mahaffey, Wheeler & Bryson, its
Attorneys.

Duly sworn to by Jno. J. King. Jurat omitted in printing.

[fol. 333] Bond on removal for \$500.00, approved and filed June 2, 1934, omitted in printing.

[fol. 334] IN DISTRICT COURT OF BOWIE COUNTY, TEXAS,
5TH JUDICIAL DISTRICT

No. 19771

[Title omitted]

AMENDED PETITION FOR REMOVAL—Filed June 11, 1934

To the Honorable Judge of said Court:

Now comes Southern Cities Distributing Company, and with leave of the Court first had and obtained, files here-
[fol. 335] with, in lieu of its original petition for removal filed on June 2nd, 1934, its Amended Petition for Removal, and respectfully states to the Court:

1

That the above numbered and entitled suit has been brought in this Court and is now pending therein.

2

That said action is of a civil nature, instituted by the City of Texarkana, Texas, as a municipal corporation of the State of Texas, by bringing into issue the legal construction of the franchise under which defendant, Southern Cities Distributing Company is operating within the limits of said City of Texarkana, Texas, and seeking by injunction

to deny said defendant the right to apply for an increase in the rates to be charged for gas within said city to said city and consumers therein, and the right to a hearing on appeal to the Railroad Commission of Texas of its application for an increase in rates, taken from an order of the City Council of the said City of Texarkana, Texas, denying such application, and bringing into issue an order or judgment of the United States District Court of the Western District of Arkansas, Texarkana Division, relating to rates chargeable for gas in the City of Texarkana in the State of Arkansas, and seeking a judgment of the said District Court for the Fifth Judicial District of Texas forcing the defendant, Southern Cities Distributing Company, to reduce its [fol. 336] rates in Texarkana, Texas, to those heretofore in effect in Texarkana, Arkansas; and in which said plaintiff also seeks to enjoin the members of the said Texas Railroad Commission from hearing and passing upon the said appeal of said defendant, and in which other matters and issues are presented, and all of which more fully appear from the plaintiff's said complaint or bill, and which for the purpose of showing the character of the action by the plaintiff is made a part hereof by reference to the same extent as though fully copied herein.

3

That the value of the matter in controversy, and especially as between said plaintiff and this defendant, in said action exceeds three thousand dollars (\$3,000.00), exclusive of interest and costs.

4

That the plaintiff's action, as a matter of fact and as shown by its allegations, involves a separable controversy as between it, a resident and citizen of the State of Texas, and the defendant, Southern Cities Distributing Company, a resident and citizen of the State of Delaware, and is a controversy which is wholly between citizens of different states, and which can be fully determined as between them.

5

That the plaintiff's action herein involves a controversy which is wholly between citizens of different states, in that [fol. 337] the City of Texarkana, the plaintiff, is a municipal

corporation, and a body politic, incorporated under the laws of the State of Texas, wholly situated in said state, and was at the time of the commencement of this suit in this court and still is a citizen of the state of Texas, and a resident of the County of Bowie in the Eastern Federal District of the State of Texas, Texarkana Division; and that your petitioner, Southern Cities Distributing Company, defendant herein, is a private corporation incorporated under the laws of the State of Delaware, with its principal office in said State in the City of Wilmington, and was at the time of the commencement of this suit and still is a citizen and resident of the State of Delaware and was not and has not been a citizen and resident of the State of Texas.

6

As an additional ground showing that this suit is removable and that the controversy as to this defendant is separable, defendant states that the members of the Railroad Commission are not proper parties in this suit, and should be wholly disregarded in considering whether the suit is removable.

7

As an additional ground showing that this suit is removable and that the controversy as to this defendant is separable, defendant states that the members of the Railroad Commission are only nominal parties in this suit having [fol. 338] no real or substantial interest and should be wholly disregarded in considering whether the suit is removable. The members of the Railroad Commission, at most, have a representative or governmental interest only, and whatever should be the outcome of the suit, they would not be real parties substantially in interest.

8

As an additional ground that this suit is removable and that the controversy as to this defendant is separable, defendant states that the members of the Railroad Commission are not indispensable parties to this suit and should be wholly disregarded in considering whether the suit is removable. They are not necessary parties at all, even if it should be held that they are in any sense proper parties to this suit.

9

The Railroad Commission of Texas is a governmental agency in the same sense as the City and City Council and Officials of Texarkana, Texas. In considering whether the case is removable, the parties should be re-aligned so as to show the true situation; that is to say, if the Railroad Commissioners are proper parties in any sense they should be aligned with the plaintiff, the City of Texarkana, Texas. The members of the Railroad Commission of Texas, Lon A. Smith, C. V. Terrell and Ernest O. Thompson, are all residents and citizens of Austin, Travis County, Texas, and [fol. 339] were at the time this suit was filed and have been ever since.

10

Plaintiff states that the joinder of the members of the Railroad Commission of Texas was made fraudulently and for the sole and only purpose of undertaking to prevent a removal of this case.

11

As an additional ground showing that this suit is removable and that the controversy as to this defendant is separable, defendant states that this Court wholly lacks jurisdiction and venue over those defendants who are members of the Railroad Commission of Texas, and that this suit should be treated as if it were wholly between the City of Texarkana, Texas, and this defendant, Southern Cities Distributing Company.

12

As an additional ground showing that this suit is removable and that the controversy as to this defendant is separable, defendant shows that no action whatever is stated against the defendants who are members of the Railroad Commission of Texas for the reason that the petition is insufficient as a matter of law as against those defendants.

13

That the plaintiff's action, as a matter of fact and as shown by its allegations, involves a federal question, in [fol. 340] that it involves the construction and application of the order and judgment made and entered as alleged in plaintiff's said complaint or bill by the United States Dis-

trict Court for the Western District of the State of Arkansas, Texarkana Division, in that it seeks to enforce same in Texarkana, Texas, by compelling said defendant to observe and comply therewith in making charges for gas in the City of Texarkana in the State of Texas, and thereby give to said order and judgment of said Federal Court extra territorial force, all as shown by the plaintiff's said complaint or bill, and which with reference thereto is made a part hereof as though fully copied herein.

14

That the time within which your petitioner, Southern Cities Distributing Company, defendant herein, is required by the laws of this state, and the rules of this Court, to answer or plead to the declaration or petition of the plaintiff, in the above entitled action, has not expired.

15

Your petitioner, defendant herein, presents herewith a bond with good and sufficient surety, conditioned that it will enter into the District Court of the United States for the Eastern District of Texas, Texarkana Division, within thirty days from the time of the filing of this petition and of said bond a certified copy of the record in this suit, and [fol. 341] that it will pay all costs that may be awarded by said United States District Court in case said Court shall hold that suit was wrongfully or improperly removed thereto.

Wherefore, your petitioner prays that this Court proceed no further herein, except to accept said surety and bond and by order cause the record herein to be removed into said District Court of the United States within and for the Eastern District of Texas, Texarkana Division of said Court, according to the statute in such cases made and provided.

Southern Cities Distributing Company, petitioner,
by W. H. Arnold, Jr., H. C. Walker, Jr., King,
Mahaffey, Wheeler & Bryson, Its Attorneys.

Duly sworn to by Jno. J. King. Jurat omitted in printing.

[fol. 342] [File endorsement omitted.]

IN DISTRICT COURT OF BOWIE COUNTY, TEXAS

No. 19771

ORDER OVERRULING PETITION FOR REMOVAL—June 11, 1934

On this the 11th day of June, A. D. 1934, court being in regular session, came on to be heard the petition of Southern Cities Distributing Company, one of the defendants in this cause, for removal of this cause to the District Court of the United States for the Eastern District of Texas, Texarkana Division, and said defendant as petitioner appeared by its attorneys, W. H. Arnold, Jr., and Jno. J. King, and the plaintiff, The City of Texarkana, Texas appeared by its attorneys, Ed B. Levee, Jr., City Attorney for said City of Texarkana, Texas, and B. E. Carter, and it was made to appear that the defendants, Lon A. Smith, C. V. Terrell and Ernest O. Thompson as members of the Railroad Commission of Texas, had filed their appearance, and also an answer in the cause, and said defendant, petitioner, having by leave of the court filed on this date its amended petition for removal, the Court proceeded to hear said amended petition for removal.

Said petitioner presented and urging said petition for removal at the same time presented and tendered its bond for such removal, and the Court having heard the argument, and being advised as to the law, concluded that the cause of action, in view of the said members of the Texas Railroad Commission being made parties defendant, was not removable, but that the bond of petitioner tendered was sufficient in form and as to the amount and as to the surety to meet all of the requirements of the law.

It is, therefore, ordered, adjudged and decreed by the Court that the said petition of said Southern Cities Distributing Company for removal be and it is in all things overruled and refused, but that if the case was removable, the said bond of said petitioner for removal is as to form, amount and as to surety, in all things sufficient to meet the requirements of the law. To which judgment and order [fol. 344] refusing and denying the petition for removal said petitioner thereupon and in open court excepted.

This date having been previously set for a hearing of the plaintiff's petition for a temporary injunction, said

hearing is continued until Friday, June 15th, 1934, at ten o'clock A. M.

R. H. Harvey, Judge, Fifth Judicial District.

[File endorsement omitted.]

TRANSCRIPT OF THE RECORD OF BOWIE DISTRICT COURT FILED
IN THE U. S. DISTRICT COURT, ETC.

State: "Transcript of the record of Bowie County District Court was on June 13, 1934, filed in the United States District Court for the Eastern District of Texas, Texarkana Division."

[fol. 345] IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS, TEXARKANA DIVISION

CITY OF TEXARKANA, TEXAS, Plaintiff,

vs.

SOUTHERN CITIES DISTRIBUTING COMPANY et al., Defendants

PETITION OF DEFENDANT FOR REMOVAL TO FEDERAL COURT—
Filed June 13, 1934

To the Honorable Randolph Bryant, Judge of the District Court of the United States for the Eastern District of Texas:

Your petitioner respectfully shows:

1

Petitioner, Southern Cities Distributing Company is one of the defendants in the above entitled cause which was originally filed in the District Court of Bowie County, Texas, Fifth Judicial District, being case numbered 19,771 upon the docket of said court, which was filed on May 23, 1934, at Boston, Texas.

2

Petitioner filed a petition and bond for the removal of this cause to this federal court. Said petition was filed on June 2, 1934, within the time provided for by federal statute.

Prior to filing, notice was served upon plaintiff's attorneys of the filing of said petition and bond.

[fol. 346]

3

On June 11, after leave of the court was first had and obtained, petitioner filed an amended petition for removal.

4

Thereafter, on June 11, 1934, the Judge of said state court, after having heard argument of counsel, made and entered an order in said cause, denying said petition for removal.

5

Petitioner filed in this court on the — day of June, 1934, a certified transcript of the record and proceedings in said state court, all within the thirty days provided for by statute.

6

All of the pleadings and the order above referred to are set forth in said record, to which reference is made for greater certainty.

7

As shown by the order overruling the petition for removal the plaintiff, City of Texarkana, Texas, has caused a hearing on plaintiff's petition for a temporary injunction to be set for Friday, June 15, 1934, at ten o'clock A. M.

8

Petitioner shows to the court that if any further action is taken in said state court on said date, it will be wholly [fol. 347] without jurisdiction of the state court, but will inflict irreparable injury and damage upon the defendant, Southern Cities Distributing Company, and that its rights may be prejudiced thereby.

9

Petitioner makes a part of this petition its pleadings for removal filed in the said state court, which states the grounds upon which this cause is removable to the federal court.

Defendant, Southern Cities Distributing Company, states that the plaintiff in said case, the said City of Texarkana, Texas, purposes and intends to proceed in said action in said state court on said June 15, 1934, to take further steps and to ask for orders and judgment therein.

Wherefore, petitioner prays that prior to further procedure by plaintiff in said state court, and order be made and entered by this court restraining all proceedings in said state court until further order of this court, and restraining the City of Texarkana, Texas, its Attorneys, officials and agents from taking any further steps in the said suit in the state court until the question of removability of this cause can be settled; that this court issue an order holding that the cause be removed to this court, and that the case be docketed in this federal court.

Southern Cities Distributing Company, by H. C. Walker, Jr., W. H. Arnold, Jr., King, Mahaffey, Wheeler & Bryson, Its Attorneys.

[fol. 348] *Duly sworn to by Jno. J. King. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 349] IN DISTRICT COURT OF THE UNITED STATES

[Title omitted]

RESPONSE OF PLAINTIFF TO PETITION FOR RESTRAINING ORDER
AND MOTION OF PLAINTIFF TO REMAND—Filed June 13,
1934

To the Honorable Randolph Bryant, Judge of the District
Court of the United States for the Eastern District of
Texas:

Comes the plaintiff, the City of Texarkana, Texas, and appearing especially for the purposes of this response and motion only, saving and reserving any and all objections which it has to the jurisdiction of this Court, and for its response to the petition filed herein by the Southern Cities

Distributing Company asking that this Court restrain all proceedings in the District Court of the State of Texas in and for Bowie County, Texas, and for its motion that this cause be remanded to the said District Court of Bowie County, Texas, respectfully shows:

1. That under the provisions of the Johnson Bill, same being Public Act No. 222 of the 73rd Congress of the United States approved May 14th, 1934, this Court has no jurisdiction to grant the relief prayed for by the plaintiff in its [fol. 350] petition filed in the State Court. This case is not one over which this Court could have had jurisdiction and is not one which the plaintiff could have filed in this Court. This is a suit to enjoin an action of the Railroad Commission of Texas, which is an administrative board and Commission of the State of Texas, and is a suit to restrain, suspend and enjoin the enforcement and operation of the order entered by said Railroad Commission granting to the defendant the Southern Cities Distributing Company an appeal from an order made by the City Council of the City of Texarkana, Texas, which City Council is a rate making body of a political subdivision of the State of Texas. The jurisdiction of this Court, as shown by the plaintiff's petition for removal, is invoked solely on the alleged ground of diversity of citizenship and of an alleged separable controversy and under the provisions of the statute above quoted this Court has no jurisdiction.

2. No separable controversy exists between the plaintiff, the City of Texarkana, Texas, and the defendant, the Southern Cities Distributing Company, in this case. The Southern Cities Distributing Company, a public utility supplying gas to the City of Texarkana, Texas, applied to the City Council of said City, which City Council is a rate making body of a political subdivision of the State of Texas, for an increase in gas rates. The City Council of said City refused to grant said increase on the ground that the defendant Gas Company had bound itself by contract not to apply [fol. 351] for an increase in rates except after one year's notice and that it had not shown any ground why the City Council should waive the rights of the City under said contract and also upon the ground that said Gas Company had not shown that its present rates were not fair or were unreasonable. The defendant Gas Company thereupon filed

on March 5, 1934, with the Railroad Commission of Texas an appeal from this order, and that Commission on March 12, 1934, made an order allowing said appeal on condition that the Company file a bond, which bond has never been filed. The plaintiff's petition in this case in the District Court alleged that said appeal of the Gas Company was in violation of its contract and also alleged that the Texas Railroad Commission and the members thereof had no right or authority to entertain said appeal or to relieve the defendant Gas Company of its contract that it should not apply for an increase in rates except after one year's notice.

The defendant Gas Company had also contracted with the City of Texarkana, Texas, that in the event it was forced to place lower rates in effect in Texarkana, Arkansas, than those which were in effect in Texarkana, Texas, it would at once give to the City of Texarkana, Texas the benefit of such lower rates. The defendant Gas Company was forced, as alleged in the original petition herein, to place lower rates in effect in Texarkana, Arkansas and to make this reduction retroactive to May 30, 1930. The City Council of the City of Texarkana, Texas, being a rate making body [fol. 352] of a political subdivision of the State of Texas, in the course of the proceedings upon the application of the defendant Gas Company for an increase in rates, ordered said Gas Company to place in effect in Texarkana, Texas, the lower rates which it had been forced to place in effect in Texarkana, Arkansas, and which were then in effect in said City. The Gas Company, on March 5, 1934, filed with the Texas Railroad Commission an appeal from this order of the City Council and said Railroad Commission on March 12, 1934, granted this appeal and directed that said order of the City Council should be suspended and superseded on the filing and approval of a bond by the Gas Company.

The plaintiff seeks in its original petition herein to enjoin the Gas Company from prosecuting this appeal and to enjoin the members of the Texas Railroad Commission from entertaining this appeal and from granting the defendant Gas Company any relief from the order of the City Council.

The plaintiff says that the controversies above described are not separable controversies and that there are no sepa-

able controversies presented in its original petition filed in the District Court of Bowie County, Texas. The defendants, the members of the Railroad Commission of Texas, prior to the action of the State Court on the petition for removal herein, filed in said Court their answer in which they alleged and set up that they did have jurisdiction to entertain said appeals and that it was their duty to do so and to determine [fol. 353] them and in which they protested against any order being made enjoining them from hearing and deciding said appeals.

For further response to the petition for a restraining order herein the plaintiff shows that no restraining order is necessary to uphold the jurisdiction of this Court, if it does have jurisdiction; that no great or irreparable injury will result to the Southern Cities Distributing Company if this Court refuses to grant a temporary restraining order. They say further that no court has yet passed upon or construed the statute (the Johnson Bill) above referred to, except the District Court of Bowie County, Texas, in passing upon the petition for removal in this case, and that Court decided that this case was not one of which this Court has jurisdiction; and the plaintiff says that the clear purpose of said statute is to deprive the Federal Courts of jurisdiction to interfere with, to restrain, or to enjoin any action of a state rate making body, that this controversy is now pending in the State Courts where a plain, speedy and efficient remedy may be had unless this Court interferes with the orderly procedure in said State Court, and that if this Court is not now ready to pass upon the question of its jurisdiction it ought not to interfere with the orderly procedure in the case which was brought in the State Court and as to which the State Court has decided that it has jurisdiction.

[fol. 354] The plaintiff further shows the Court that the rule in all of the Federal Courts except those in the Eighth Circuit is that where the jurisdiction of the Federal Court is doubtful the case should be remanded to the State Court where the jurisdiction is beyond dispute and that the uniform practice, so far as this plaintiff has been able to ascertain, is to refuse to enjoin proceedings in State Courts where the jurisdiction of the Federal Court is doubtful and where the only injury to the defendant will be the inconven-

ience and expense of double litigation and where no very great expense will be involved.

Premises considered the plaintiff prays that the defendant take nothing by its petition for a restraining order herein and that upon a hearing of the plaintiff's motion to remand that this cause be remanded to the District Court for the Fifth Judicial District in and for the County of Bowie and State of Texas.

Respectfully submitted, Ed B. Levee, Jr., Ben E. Carter, Attorneys for the plaintiff.

[File endorsement omitted.]

[fol. 355] IN DISTRICT COURT OF THE UNITED STATES

In Equity. No. 109

[Title omitted]

ORDER OVERRULING MOTION TO REMAND, AND GRANTING INJUNCTION AGAINST CITY—Filed June 15, 1934

Now on this June 13, 1934, came Southern Cities Distributing Company by its Attorneys, W. H. Arnold, Jr., and Jno. J. King, and came the City of Texarkana, Texas by its Attorneys B. E. Carter and Ed B. Levee, Jr., whereupon the Southern Cities Distributing Company presented its petition to the Court asking this court to hold that it has jurisdiction over this cause, and to restrain the City from prosecuting or taking any steps in the District Court of Bowie County, Texas, in which court the case was originally filed. The City of Texarkana, Texas, presented motion to remand the case; and the court after having heard the arguments and statement of counsel for each side, and being well and sufficiently advised, both as to the law and the facts,

It is ordered, adjudged and decreed that this cause should be and the same is hereby removed to this court, and the motion of the City of Texarkana, Texas, to remand the case [fol. 356] to the District Court of Bowie County, Texas, is overruled. It being further represented to the Court that the City was about to take some steps before the District Court of Bowie County, Texas,

It is further ordered that the City of Texarkana, Texas, its Mayor, Aldermen, officials and Attorneys, be and they

are hereby restrained and enjoined from further prosecuting or taking any steps in the District Court of Bowie County Texas, in this suit.

The City of Texarkana, Texas, excepted and asked that its exceptions be noted of record, which is accordingly done.

Randolph Bryant, Judge.

O.K. as to form: B. E. Carter, Ed B. Levee, Jr.

[File endorsement omitted.]

[fol. 357] IN DISTRICT COURT OF THE UNITED STATES

In Equity. No. 109

[Title omitted]

ANSWER AND COUNTER CLAIM OF DEFENDANT—Filed July 12,
1934

To the Honorable Randolph Bryant, United States District
Judge:

Now comes the Southern Cities Distributing Company, and for its answer to plaintiff's original petition in this case which was removed to this court in June 1934 and counter-claim states:

I

That on November 3, 1933, it filed with the city council notice and application for change and modification of rates, copy of which is attached as Exhibit "C" to plaintiff's original bill herein and defendant now reaffirms the statements therein contained. As said application states, the gas rates have failed and, in the future, will fail to produce revenues sufficient to pay operating expenses, much less an amount for depreciation, and return on investment; The application sets forth a new schedule for domestic and commercial rates: \$1.75 for the first 1000 cubic feet of gas, 75¢ each for the next 2000 cubic feet of gas, 55¢ each for the next [fol. 358] 7000 cubic feet of gas, and 35¢ each for all over 10,000 cubic feet of gas. The losses under the franchise rates were set forth and it was shown that the new rates would not produce more than what the company was entitled to, and that the current losses were \$350.00 per day.

II

On November 9, 1933, defendant filed motion for prompt hearing and action, copy of which is hereto attached as Exhibit "A" and the statements therein are here re-affirmed. Said motion avers that it was essential, to avoid daily confiscation of the company's property, that the council have prompt hearing and temporarily authorize the new rates to be placed into effect pending final hearing of the council, on the ground that the company would have no remedy for recovering each day's loss in the interval before it should obtain final relief.

III

On November 14, 1933, the company was present in the Council meeting by its attorneys with witnesses, and requested permission to introduce its evidence, but the council refused to hear the company; without a hearing, the Council passed "A Resolution Calling On Southern Cities Distributing Company For Information Needed by The Council In Connection With Said Company's Application For New Rates And Ordering Said Company Not To Put Into Effect [fol. 359] The Proposed Rates Shown In The Notice And Application Filed With The City Secretary On November 3, 1933," Referring to the company's application and motion for prompt hearing, which asked that the council pass upon that part of the application praying for prompt preliminary relief, and referring also to Section VIII-A of the franchise of June 13, 1930, the resolution stated: "The Council is willing, if proper information is submitted to it, but without waiving any of its rights under said franchise ordinance above described and without waiving any of its rights or any of the rights of the consumers under the laws, general and special, of the State of Texas, to consider the question whether it would waive said provisions of said franchise;" and called upon the company for detailed evidence as to the company and its affiliated pipe line companies and as to all matters relating to the fixing of rates; and "does order and require that before the council will proceed with the hearing on the application heretofore filed with it, said information shall be furnished in writing, in duplicate and under oath, the Council finding that it is necessary that it have knowledge of the facts hereinafter set forth in order to enable it to pass upon said application and to perform its duties to the gas consumers in said city, said information

so required being as follows:" * * * here follow detailed and voluminous questionnaire and interrogatories going into great detail. This resolution in Section II refers to important factors in fixing the rates and in determining the question whether the company is losing money in its [fol. 360] plant in Texarkana, Texas, and recites that "The Council cannot pass upon the question whether" etc. without the information hereinbefore called for. Section III orders the company "not to put the proposed new rates into effect pending a hearing and decision upon its application," and postpones a hearing until the information should be furnished. Section IV provides that the council will pass on objections to any of the questions on November 28, 1933. Section V provides that "as soon as the Southern Cities Distributing Company informs the Council when it can and will furnish the information herein called for, the council will take up the question of setting its application for final hearing."

IV

On November 16, 1933, the city filed petition in the District Court of Bowie County, Texas, to enjoin the company from increasing its rates in Texarkana, Texas. Temporary Restraining order was granted by the Judge of the Bowie District Court on the same day suit was filed without notice to or knowledge of the Company and without a hearing accorded to it. This suit was removed to this court and answer and counter-claim was filed by the company. The City thereafter filed amended and substituted petition and the company filed amended and substituted answer and counter-claim. Thereafter the city in open court moved to dismiss both its petition and the company's counter-claim. The city's petition was non-suited, but the court overruled [fol. 361] the city's motion to dismiss the company's cross bill. The pleading and record of this court in said suit are made part hereof by reference.

V

On November 17, 1933, defendants filed with the Council request that the questions be amended in certain respects. On November 28, 1933, the company appeared by its attorneys with witnesses, and the council passed a resolution amending the interrogatories and propounding additional interrogatories.

VI

On the — day of December 1933, the company appeared by its attorneys with witnesses and filed in duplicate and under oath the voluminous evidence requested. On the same day, the council passed another resolution with reference to the date of hearing.

VII

On the 12th day of December 1933, in the absence of the Company or its attorneys or witnesses or representatives, the council without notice to the company and without a hearing, passed a resolution which referred to a decree of the U. S. District Court for the Western District of Arkansas, dated December 1, 1933, holding,—not upon the merits, but upon a technicality—that the rates in Texarkana Arkansas, should for the present be those adopted in Texarkana, Arkansas, in 1923, and ordering refund since June [fol. 362] 1930 to December 1, 1933. The said resolution also referred to Section IX of the franchise of June 13, 1930, in Texarkana, Texas, and in Section I resolved: "The Southern Cities Distributing Company is now ordered and directed to comply with its franchise contract and agreement and to restore in the city of Texarkana, Texas, the rates for gas which were in effect in said city on and prior to the passage and acceptance of the franchise ordinance above described, to put such rates into effect on all bills rendered by it to gas consumers on and after December 1, 1933, and to maintain such rates in effect until such time as they may be lawfully changed." Section II reads: "The City Attorney is directed to call upon said company at once to make refunds to all its consumers in Texarkana, Texas, of the difference between the amounts collected from them under said franchise since May 30, 1930, and the rates which have been found in said case to have been the lawful rates in the city of Texarkana, Arkansas, during said period and upon the basis of which refunds have been ordered to consumers in said city," and in the event of refusal of the company to make such refunds, the city attorney was ordered to file suit in the name of the city for the benefit of the gas consumers for recovery of such refunds. Copy of the resolution is attached to plaintiff's original bill and it is made part hereof by reference.

VIII

On December 27, 1933, the Council passed a resolution with reference to the time of the hearing.

[fol. 363]

IX

On January 2, 1934, the Council passed a resolution with reference to the time of the hearing.

X

On January 22, and 23, 1934, there was a full hearing before the Council at which both sides were represented by attorneys and at which voluminous evidence was introduced, consisting of documentary and of record evidence and testimony of experts, engineers, accountants and other witnesses, covering all phases of the rate case; at the conclusion of which the council passed a resolution dated January 23, 1934, stating that its resolution of November 14, 1933, "recited that it was willing, if proper information be submitted to it, but without waiving any of its rights under said franchise contract, to consider the question whether the provisions of said contract were oppressive or unjust and whether it should waive the same and calling upon said Southern Cities Distributing Company to furnish the proper information from which the Council could determine said question." The resolution further recites that the Council "having heard all the evidence, does hereby make the following findings with reference to the question as to whether it should waive the provisions of said franchise agreement and consent to consider an application for increased rates without said one year's notice and with reference to the propriety of the increased rates and charges proposed by the company." The findings of the Council then follow in 25 pages of the resolution. The conclusion of the resolution sets forth an order that: (1) the Council refuses to waive and still insists upon the franchise provision of one year's notice and orders the city attorney "to pursue and insist upon his application now pending in the courts for an injunction to secure a specific performance of said franchise agreement;" (2) that the schedule of rates proposed by the company "are unjust and unreasonable and are exorbitant and improper rates and would result in an even greater and more unjust discrimination against the

consumers of gas of Texarkana, Texas, than are the rates the company is now collecting in violation and in disregard of its franchise agreement to give the consumers in this city the benefit of any rates it is compelled to place in Texarkana, Arkansas, and said Southern Cities Distributing Company is forbidden to put such proposed new rates into effect;"

(3) "The city attorney is ordered, and directed to continue and to insist upon his application now pending in the courts for an order directing said company to comply with its franchise agreement and to place in effect in Texarkana, Texas, the rates it has been compelled to place in effect in Texarkana, Arkansas;" and (4) notifies the company that one year after date it will enter into a hearing to determine whether the rate should not be reduced to 40¢ per m. c. f.

[fol. 365]

XI

In Texarkana, Arkansas, application of the company for change and modification of rates was filed October 23, 1933, and full hearing was completed on December 22, 1933, resulting in resolution of the Council of Texarkana, Arkansas, which denied the company's application and prescribed a schedule of rates reaffirming the 1923 rates with certain modifications. On November 14, 1933, the city council of Texarkana, Arkansas, notified the company that the council, at the hearing of the Company's application on December 22, 1933, and would also "consider whether or not the rates collected by the company for natural gas should not be reduced below the present lawful rates." The said resolution of December 22, 1933, recited that the Council did not have evidence from which it could accurately determine certain facts and that it was necessary to obtain further evidence and continued the matter of the said city's notice to January 23, 1934, at which date it was further continued to February 13, 1934, when the council without evidence other than that theretofore introduced prior to the said resolution of December 22, 1933, further lowered the charges to a net 40¢ rate. Southern Cities Distributing Company had prepared bill in equity to enjoin the schedule of rates in Texarkana, Arkansas, prescribed in the said Resolution of December 22, 1933; and on February 9, 1934, gave notice to the city of Texarkana, Arkansas, of application for temporary injunction to be heard before Honorable Heartsill Ragon in the U. S. District Court for the Western District [fol. 366] of Arkansas at Ft. Smith, Arkansas, on February

16, 1934. In the meantime, the order of the Council in Texarkana, Arkansas, dated February 13, 1934, was passed which prescribed still lower rates; whereupon plaintiff rewrote its bill in equity to enjoin the rates prescribed on February 13, 1934, for Texarkana, Arkansas. After hearing in Ft. Smith on February 16, 1934, the court enjoined the City of Texarkana, Arkansas from enforcing the rates prescribed February 13, 1934, or those prescribed December 22, 1934, or any less rates than the schedule filed by the company and from interfering with the company in charging the rates of the schedule it had filed with the Council on October 23, 1933. Since February 12, 1934, the rates charged in Texarkana, Arkansas, have been according to the schedule filed by the company. The case is now pending on reference to Master in Chancery.

XII

On March 3, 1934, this defendant appealed to the Railroad Commission of Texas by filing petition with said Commission wherein it prayed that said commission fix and approve the schedule filed by the company, and that it set aside the Council's resolution of December 12, 1933. On the 21st day of April, 1934, the city filed in the Railroad Commission its motion to dismiss the appeal of Southern Cities Distributing Company, or, in the alternative, that all further proceedings in the commission be abated until such time as the litigation in the U. S. District Court for the Eastern District of Texas should be finally disposed of. The Company undertook to proceed in the Railroad Commission and requested that the City's motion to dismiss the appeal be set for hearing and action, but so far its efforts have been unavailing, the Commission requiring as a condition precedent to the appeal, a certain \$10,000.00 bond, and the Commission will not recognize the appeal or take action unless such a bond is filed whereas in this case, the Commission is without right or power to require said bond.

XIII

On May 23, 1934, the case at bar was filed in the District Court of Bowie County, Texas, by petition of the city, which is substantially the same as the amended and substituted petition of the city in the first case which it filed in November 1933, except that in reference to the alleged cause

of action to restrain the company "from taking any steps before the Railroad Commission of Texas," it is also alleged that the Railroad Commission should be restrained from taking jurisdiction to the appeal.

XIV

This defendant denies that the City Council of Texarkana, Texas, on March 13, 1923 granted a franchise to Southwestern Gas & Electric Company, although the council did pass an ordinance on said date, the terms of which will appear by [fol. 368] certified copy thereof, but said ordinance has been superseded by a new franchise that was granted to this defendant on June 13, 1930. The rates therein set forth were proposed by the council to the company after investigation and hearings, and they were accepted by the company. Defendant denies that it is estopped from questioning those terms or conditions of the said franchise that are invalid and not binding; denies that it is estopped from changing or attempting to change and modify the rates therein set forth, because the rate making power cannot be abridged, contracted away or held in abeyance, and because rates are always subject to regulation and cannot be fixed so they cannot be modified and changed by the city or by the company if the evidence justifies, and because the facts in this case show that the franchise rates are confiscatory; defendant denies that its notice and application for change and modification of rates filed on November 3, 1933, and efforts to secure reasonable rates in the Council and in the Railroad Commission were or are in violation of any valid provisions of the franchise agreement or of Section VIII-A thereof.

XV

This defendant denies that said Section VIII-A of the franchise constitutes a valid and binding waiver of its rights under the Texas statutes to secure an increase in rates, except upon one year's notice; denies that its attempt to secure an increase by appeal to the Railroad Commission is in violation of any of the valid terms of the franchise; denies that the Railroad Commission is without jurisdiction and is without power to pass upon the schedule of rates filed by the company; denies that plaintiff is entitled to an injunction restraining Southern Cities Distributing Company from proceeding with the appeal.

XVI

Defendant states that plaintiff has no cause of action to prevent the company increasing the prescribed and confiscatory rates and no cause of action to enjoin the appeal to the Railroad Commission; that Southern Cities Distributing Company cannot proceed with its appeal to the Railroad Commission because of Railroad Commission takes the position that the appeal is not perfected and will not be perfected unless Southern Cities Distributing Company files the bond called for; and in the absence of such a bond which it is under no obligation to give, Southern Cities Distributing Company cannot prosecute its appeal.

XVII

This defendant denies that any franchise was granted by the Council on March 13, 1923, to Southwestern Gas & Electric Company, although an ordinance of the Council was passed on or about said date which will speak for itself, and avers that said ordinance and Article E thereof were superseded by the franchise of June 13, 1930. Defendant denies that said Article E or Section IX of the franchise [fol. 370] of 1930 are valid or binding agreements on either the city or this defendant; denies that the city of Texarkana, Texas, and the City of Texarkana, Arkansas, are one city in law; denies that the same plant in all parts serves both cities; denies that consumers in Texarkana, Arkansas, are served from the same mains as consumers in Texarkana, Texas, except in certain cases.

XVIII

This defendant denies that in Texarkana, Arkansas, referendum petitions against the Resolution of May 30, 1930, of the City Council of said City were once circulated in Texarkana, Arkansas, and given a great deal of publicity in the newspapers; denies that such alleged petitions and publicity took place prior to the action of the Council of Texarkana, Texas, on June 13, 1930; denies that it was then contemplated by both or either party that the resolution in Arkansas might be upset by means of said petitions; denies that Section IX was designed to take care of the situation in the event the resolution in Arkansas should be upset; denies that it was in violation of Section IX of the franchise

that this defendant failed and refused to put into effect in Texas the rates which the company placed in effect in Texarkana, Arkansas, on December 1, 1933. Defendant states that if Section IX were assumed to be valid, it is not ambiguous and would relate only to the amount to be charged in Texarkana, Texas, after December 1, 1933, and prior to February 12, 1934, and could not be construed to be retro-[fol. 371] active. Even if said provisions could be assumed to be valid and ambiguous, there is no indication that it was contemplated that the resolution of May 30, 1930, in Arkansas might be upset; it was not prior to June 13, 1930, contemplated by anyone that there would be any litigation or contest over the validity of the Resolution of May 30, 1930, in Arkansas. It was assumed and agreed by both parties that the rates fixed in the franchise of June 13, 1930 would be valid and binding until such time in the future as the rates in Arkansas might be reduced by a new application and rate case upon notice and hearing to be started by the City of Texarkana, Arkansas, at some future date, and that was the only contingency that could have been or was contemplated by any of the parties at the time the franchise of June 13, 1930, was passed.

XIX

This defendant denies that the gas consumers in Texarkana, Texas, are entitled to an order directing defendant to at once place in effect in the City of Texarkana, Texas, lower rates provided in the alleged franchise of 1923; denies that such consumers are further entitled to an order directing defendant to make refunds to such consumers for the excess collected by the company from the time the franchise rates of June 1930 were put into effect, down to February 16, 1934, over and above the amount which is alleged to have been due under rates provided under the alleged franchise of 1923.

[fol. 372] Defendant denies that the decree of the United States District Court in Arkansas compelled it to place in effect in Texarkana, Arkansas, as of May 30, 1930, rates less than the rates shown in the Texas franchise dated June 13, 1930, but states that the same rates were charged in both sides of the City until December 1, 1933; denies that said franchise contains any valid provisions that if the defendant is compelled to place lower rates in effect

in Texarkana, Arkansas, that the lesser rate shall apply in the City of Texarkana, Texas; denies that the provision referred to, even if assumed to be valid, bears the construction the City placed thereon; denies that defendant has received from numerous gas consumers in the City of Texarkana, Texas, assignments to the plaintiff of a part of such alleged refunds as may be due them; denies that such alleged assignments were granted to the City for the purpose of paying the expenses of this litigation and for the purpose of paying the expenses of the present controversy now pending as to increased rates; denies that it would be unfair and unjust to the plaintiff to permit the defendant to defeat the City's alleged right to recover under said alleged assignments by any offsets which defendant might claim against such alleged refunds arising on and after the date of the filing of said petition; denies that the plaintiff and the gas consumers in Texarkana, Texas, are without any adequate remedy at law; denies that the plaintiff will be damaged in the sum of \$50,000.00 or in any other sum; denies that plaintiff is entitled to any injunction re-[fol. 373] straining this defendant from putting into effect an increase in rates in the City of Texarkana, Texas, except after having given one year's notice, or restraining the defendant from putting into effect increased rates at any time or in any manner except at the time and in the manner which plaintiff alleges is provided in the franchise agreement; denies that plaintiff is entitled to any order restraining defendant from prosecuting and from taking any further steps in its appeal which has been lodged with the Railroad Commission of Texas; denies that plaintiff is entitled to an injunction against the Railroad Commission of Texas; denies this defendant should be ordered to comply with Section IX of the franchise as alleged by plaintiff, or to, at once or at any other time, place in effect in the City of Texarkana, Texas, the rates for gas which were placed in effect in the City of Texarkana Arkansas, on December 1, 1933; denies that the court should require bond from this defendant conditioned that in the event it is not successful in maintaining rates which it is now collecting under a temporary restraining order in Texarkana, Arkansas, and is compelled to make refunds down to the basis of a lower rate, the company should also make refunds to its consumers in the City of Texarkana, Texas, down to the basis of such lower

rates; denies that this defendant should be ordered to file with the Clerk of the Court statement as alleged in the third section of the prayer or to pay any amount into the registry of the court.

[fol. 374]

XX

This defendant states that Section VIII-A of said franchise is invalid in that it conflicts with and violates the laws and constitution of the State of Texas under which the power of rate regulation cannot be suspended or held in abeyance and under which rates cannot be contracted by any binding provisions; after notice and hearing, they are subject at all times to change if the facts justify. Under the regulatory powers of the state, said Section VIII-A is invalid because it attempts to make binding provisions as to rates suspending, and holding in abeyance the governmental power of the state and its subdivisions, which is subject to exertion at any time; the governmental power of regulation of rates cannot be suspended for any definite and certain period of time; but rates however fixed and prescribed whether in a franchise or contract or in an order of a regulatory body, are subject to a change at any time thereafter, either upon the initiation of the city or upon the application of the company. Said Section VIII-A is not binding upon the city and, being unilateral, cannot be binding on the defendant for want of mutuality; the city lacks the power to make any binding agreement which shall hold in abeyance its governmental power over rates. If it should be conceded that rates could be controlled by binding contract, there would in view of the laws and constitution of the State, be such an inevitable conflict between that binding provision and the dominant power to regulate as to render the contract inoperative and, therefore, to cause it to [fol. 375] perish from the mere fact of admitting its conflict with the power to regulate. The duty of the owner of property used for public service to charge only a reasonable rate and thus respect the authority of the government to regulate in the public interest, and of the government to regulate by fixing such a reasonable rate as will safeguard the rights of private ownership, are interdependent and reciprocal. The legislative power of regulating rates is a continuing one and may not be abridged or bartered away by contract or otherwise, or held in abeyance, or suspended.

Defendant states that it had the right on November 23, 1933, to place into effect the schedule of rates it had filed with the council, but that it has not done so as yet. Its right is grounded in the fact that the franchise rates were and are and will continue daily confiscatory of its property resulting in daily loss as herein shown. Defendant states that its efforts before the regulatory bodies in Texas have not produced speedy, adequate or secure relief, and, in fact, the said bodies are without jurisdiction under Texas laws to grant temporary relief; the city alleges that the statutes of Texas "provide that pending the hearing before the city council said increased rates should not be placed into effect, and in the event of an appeal, they should not be placed in effect until the appeal should be passed upon by the Railroad Commission." Defendant here re-iterates the allegations contained in its application of November 3, 1933 and in its motion and affidavits filed November 9, 1933, and [fol. 376] makes them part hereof by reference, copy of former being attached to plaintiff's bill, and copy of the latter being attached hereto. Defendant has done all it could to get relief without avail, and will have no remedy for what it has lost and continues to lose, before it shall have finally obtained relief.

The Railroad Commission of Texas has jurisdiction on the appeal from the order of the council dated January 23, 1934, refusing to grant the company's application of November 3, 1933, but erroneously refuses to recognize the appeal unless the company complies with its condition for a certain bond which it may not legally require. Article 6058 of the Revised Statutes of Texas of 1925 is construed by the decisions of Texas to provide that, where the utility seeks to increase existing rates, the increase cannot be put into effect until the commission makes its final order on appeal from refusal of the council to allow the increase. Said statute in such cases requires that the existing rates continue in statu quo and not be increased until final disposition of the case before the commission. The said statute is invalid as so construed by the courts of Texas and is violative of the due process and equal protection clauses of the Fourteenth Amendment to U. S. Constitution, in that it requires enforcement of rates that are daily confiscatory until such time as the commission makes final disposition, which may take from a few months to many months and in

this case the commission will not take jurisdiction without a bond as aforesaid, which the company refuses to file. In-[fol. 377] deed, if the Railroad Commission should take jurisdiction, it has been by statute denies power to permit increased rates with or without bond pending final hearing. It was without notice or hearing that the Railroad Commission of Texas denied the application of the company for a temporary order superseding the existing rates pending final hearing; and even if notice had been given and if a hearing had been held, the commission is without jurisdiction under Texas laws as aforesaid to allow such temporary relief regardless of the evidence. In the absence of such power, defendant has the right to fix its own rates to prevent daily confiscation of its property.

Defendant states that it has now the right to increase its rates according to the schedule it filed, and that the court should cancel Section VIII-A of the franchise and hold the Resolution of January 23, 1934, invalid, and sustain its rights in the premises. Defendant states that the City is attempting to give force and vitality to said Section VIII-A of its franchise ordinance and that such attempts on the part of the City are in violation of the law of Texas, and that the said section should be cancelled and annulled. Defendant states that its attempts and efforts to secure relief are not in violation of any valid provisions of its franchise, and are not in violation of the laws of the State of Texas, but are in conformity therewith, and yet defendant has been unable to secure relief. Defendant denies that it had the power to waive its right to seek reasonable remuneration [fol. 378] for furnishing gas in Texarkana, Texas, and denies that it did waive such right; but states that, if Section VIII-A could be assumed to be valid, the city has waived it as herein shown.

XXI

This defendant states that even if Section VIII-A of the franchise agreement could be assumed to be valid, the council has waived Section VIII-A by its order denying the Company's application on its merits and by its actions leading up thereto, in calling upon the company to go through a complete rate case, and in having a full hearing etc., consuming great expense, time and effort of the company, and in holding itself out as willing to consider the matter upon its merits and in considering the matter on its merits. Such

an order of the council on its merits is reviewable by the said commission.

XXII

Defendant states that Article E of the ordinance of March 13, 1923 is invalid for the reason that it is not now in force, as it has been superseded and for the same reasons as those set out in relation to Section IX of the franchise dated June 13, 1930. Defendant states that Section IX of the franchise dated June 13, 1930, is invalid; because it undertakes to change the laws of Texas and to deprive the city Council of Texarkana, Texas, of its lawful and sole jurisdiction; because it undertakes to delegate to and vest in [fol. 379] extra-territorial authorities and bodies outside of the State of Texas, the non-delegable power to regulate or fix rates within the State of Texas; because it is ultra vires the council; and because it undertakes to change and modify rates upon a contingency, or future event, in violation of the constitution, statutes, laws and rules of Texas, which provide that rates may be changed only after notice and hearing and only if the facts justify which they do in this case. Said Section IX undertakes to provide that if the company should be compelled to place into effect any rates in Texarkana, Arkansas, less than the franchise rates lawfully adopted in Texarkana, Texas, then, from the date of placing into effect such rates in said city in Arkansas, that the company shall thereupon apply the lessened rate in Texarkana Texas, and shall not be authorized to charge any higher rate—regardless of Texas laws, and regardless of the fact that said rates would be greatly confiscatory of the company's property and cause it daily loss—and regardless of the fact that the decree of the court in Arkansas was not based on, nor did the court undertake to consider the merits of the rate. Even if it could be assumed that Section IX is valid, it does not mean what the city contends it to mean; and it is not retro-active, and could not lawfully be retro-active. Defendant states that said Section IX cannot be upheld to prevent alleged discrimination against the gas consumers in the City of Texarkana, Texas, because the alleged discrimination cannot apply to divest the City Council of Texarkana, Texas, of its jurisdiction and place it [fol. 380] elsewhere, and cannot be made an issue herein. Defendant states that Section IX of said franchise is in conflict with the powers conferred upon regulatory bodies by

the statutes of the State of Texas, and denies that the alleged discrimination is or can become an issue herein and denies that there is any discrimination as alleged.

XXIII

The action of the Council on December 12, 1933, is a nullity and has no force because it was passed without notice to the company and without evidence or a hearing. The only action of the council concerning a reduction of rates after notice and hearing is that which gives notice that one year after January 23, 1934, it would enter into a hearing concerning whether or not the rates should be reduced. The Council has made no order reducing the rate.

XXIV

The rates set forth in the franchise of June 13, 1930, are confiscatory and have caused and will continue to cause daily confiscation of defendant's property; that the effect of the actions of the City Council of the City of Texarkana, Texas, in undertaking to deny to defendant the right to earn any fair return upon the present fair value of its property used and useful in rendering public utility gas service to the City of Texarkana, Texas, is to deprive defendant of its property without due process of law, deny [fol. 381] it the equal protection of the law, and usurp its business management, all in contravention and in violation of the Constitution and laws of the State of Texas and of the Fourteenth Amendment to and of the Constitution of the United States of America.

XXV

That: (a) On the basis of the 1923 rates for the first part and of the rates of the franchise of June 13, 1930, for the second half of the year ending December 31st, 1930, defendant's gross revenue in Texarkana, Texas, was \$307,286.76, its expenses \$399,347.90, or a difference of \$92,061.14 between its expenses and gross revenue.

(b) On the basis of the franchise rates for the year ending December 31st, 1931, defendant's gross revenue was \$306,640.48, its expenses \$365,812.90, or a difference of \$59,172.42 between its expenses and gross revenue.

(c) On the basis of the franchise for the year ending December 31st, 1932, defendant's gross revenue was \$261,432.54, its expenses \$327,087.46, or a difference of \$65,654.92 between its expenses and gross revenue.

(d) Except for the first half of 1930, when the 1923 rates were collected, the rates charged were the franchise rates. If the 1923 rates were applied, a greater loss would have resulted in each of said years.

[fol. 382] (e) If the rates proposed in defendant's application of November 3, 1933, be applied, defendant's revenue in 1932 would have been approximately \$313,037.29, its total expenses for said year being \$327,087.46, leaving a difference between gross revenue and expenses of approximately \$14,050.17.

XXVI

That: (a) the present fair value of defendant's gas distribution system in Texarkana, Texas, used and useful in rendering gas service to its customers in the City of Texarkana, Texas, as of June 30, 1934, is not less than \$525,195.64.

(b) Defendant is entitled to interest at the rate of eight per cent per annum on the fair value of its said distribution system, amounting to not less than \$42,015.65; that a less rate of return would shake confidence in plaintiff's securities and would not enable plaintiff to obtain money for the operation and financing of its business.

(c) Defendant is entitled to an annual depreciation charge of not less than five per cent upon \$411,645.64, the fair value as of June 30, 1934, of the depreciable property in its distribution system in Texarkana, Texas, amounting to \$20,582.28.

(d) Defendant must take into consideration in its statements of earnings such sum as may be necessary to allow for federal income taxes, calculated at not less than \$6,698.15.

[fol. 383] (e) Defendant is entitled to charge rates for the service which it renders to gas consumers in the City of Texarkana, Texas, which will produce sufficient revenue to enable it to earn its expenses, an amount for federal in-

come taxes, proper depreciation and a reasonable return upon the fair value of its property used and useful in rendering such service. On the basis of the rates in the schedule filed by defendant, defendant would fail by \$83,346.25 in 1932 to earn its expenses, an amount for income taxes, depreciation and a reasonable return; the figures for the year 1933 are not more, but are less favorable to an earning sufficient to take care of its expenses, an amount for income taxes, depreciation and a reasonable return, and defendant states that its experience in the immediate future will not be sufficiently favorable to permit it to earn such expenses, taxes, depreciation and reasonable return.

XXVII

That the relationship between defendant and the Arkansas Louisiana Pipeline Company and Reserve Natural Gas Company of Louisiana, which operates the pipeline system supplying natural gas to defendant for distribution in its distribution system at Texarkana, Texas, is that, except for a few shares, the stock of each of said three corporations is owned by the Arkansas Natural Gas Corporation.

[fol. 384]

XXVIII

That defendant does not produce natural gas and has no supply for sale and distribution to its customers at Texarkana, Texas, other than that it purchases from the Arkansas Louisiana Pipeline Company and Reserve Natural Gas Company of Louisiana, for which it pays for gas furnished for domestic purposes an agreed price of \$0.39 per thousand cubic feet, and other agreed rates for gas used for other purposes; the said Arkansas Louisiana Pipeline Company and Reserve Natural Gas Company of Louisiana refuse to sell to defendant for less, and without which said supply defendant is unable to carry on its business of distributing gas in Texarkana, Texas, which rates defendant believes and avers are reasonable.

XXIV

That the aforesaid pipeline system of the Arkansas Louisiana Pipeline Company and Reserve Natural Gas Company of Louisiana is interstate, extending into the states of Arkansas, Texas and Louisiana; that the said

pipeline system produces in part and purchases at the wells of other producers in part, the gas it transports to cities having distribution systems and otherwise; defendant is informed, believes and avers that said pipeline system is economically and efficiently managed; that the rates which are charged defendant by said system are the lowest reasonable rates which can be charged for gas furnished at [fol. 385] Texarkana, Texas; that said rates produce less than expenses, depreciation and a reasonable return on the fair value of the property of the said pipeline system or the value of the service rendered.

XXX

Defendant is informed, believes and avers that as of June 1, 1934, the date of the latest valuation, the present fair value of the production and transportation property of the Arkansas Louisiana Pipeline Company and Reserve Natural Gas Company of Louisiana was not less than \$35,-041,826.21.

XXXI

Defendant is informed, believes and avers that the revenues and expenses of said pipeline system for 1930, 1931 and 1932, the figures for 1933 not being at this time available, are:

	1930	1931	1932
Revenues	\$7,497,780.07	\$6,534,397.65	\$5,947,160.44
Expenses	4,128,211.14	3,904,185.52	3,314,671.84
Losses in Gasoline Plants ..	7,609.27	931.61	7,531.09
Earnings Available for depreciation and return on Investment and income Taxes	3,361,959.66	2,629,280.52	2,624,957.51

Deducting \$249,130.80 for 1930; \$161,209.30 for 1931; and \$184,124.57 for 1932, as for income taxes and an annual [fol. 386] depreciation charge of five per centum of depreciable transportation property of \$1,285,869.70, leaves net earnings available for return on the property of said pipe-

line system of \$1,826,959.16 for 1930; \$1,182,201.52 for 1931; and \$1,154,963.24 for 1932; or on \$35,041,826.21, the fair value of the system as of June 1, 1930, a percentage return of 5.21% for 1930; 3.37% for 1931; and 3.30% for 1932.

XXXII

That the City Council of Texarkana, Texas, in undertaking to find whether the rates and charges filed and applied for by defendant were just and reasonable, found:

(a) That the Arkansas Natural Gas Corporation is substantially owned and is actually controlled by the Cities Service Company and that the Cities Service Company is managed and controlled by Henry L. Doherty, doing business as Henry L. Doherty & Company; whereas, there was no evidence before said council whatsoever of the ownership of the Arkansas Natural Gas Corporation or of the control and management of the Cities Service Company of Henry L. Doherty & Company; and such finding with respect to the Arkansas Natural Gas Corporation is incorrect and without foundation in fact; on the contrary, the owners of the preferred stock of the Arkansas Natural Gas Corporation select the majority of the board of directors of that corporation and thereby control the same, and the Cities Service Company does not own a majority of the [fol. 387] preferred stock of said Arkansas Natural Gas Corporation.

(b) That the sums paid to Henry L. Doherty & Company under contract with the Arkansas Louisiana Pipeline Company and the Reserve Natural Gas Company of Louisiana referred to as "pipeline companies" are not properly chargeable into the expenses of such pipeline companies in arriving at the cost and reasonableness of the charges for gas furnished defendant by such pipeline companies, because the cost of the service rendered by Henry L. Doherty & Company to such pipeline companies was not shown; whereas, under said contracts and the relations of the parties thereto, such charges are reasonable, just and proper for the service rendered. Henry L. Doherty & Company has built up and maintains a complete organization for the designing, construction, operation and development of public utilities and natural gas properties. This organization consists of experienced executives, financial

advisers, construction, valuation and gas engineers, geologists, technicians, rate experts and accountants. The expense to a corporation like the said pipeline companies of maintaining such an organization to provide the services furnished by Henry L. Doherty & Company would be prohibitive. Such contracts placed at the disposal of the pipeline companies, engineering, accounting, geological, business and financial services of a value and of a character and extent which could not be economically acquired by individual corporations or any small group of them. Like [fol. 388] contracts are made by other public utilities with similar organization-, such as Ford, Bacon & Davis, Stone & Webster and others. The propriety of such contracts is to be determined by the sound business judgment of the owners of the companies. The activities of Henry L. Doherty & Company of direct benefit to distributing and pipeline companies are those tending to increase consumption of natural gas by advertising, developing and marketing of gas burning appliances; geological, technical and research, tax, valuation and rate, purchasing, training of personnel, preparation and care of corporate records, engineering, accounting, auditing, finance and construction.

(c) That the sum of \$66,042.50 paid in 1930 for rentals on nonproducing gas leases should not be charged into the operating expenses of the pipe line companies, because such leases are not at present used for production of gas; a considerable part are located in Mississippi, more than a hundred miles from the nearest pipeline of the pipeline companies; the pipeline companies have reserves of gas under their present producing leases adequate to supply their present requirements for approximately five years; these nonproducing leases were acquired and are being held for the use of customers whom the pipeline companies hope to serve at least five years in the future; whereas, such nonproducing leases are, as to a large percentage thereof, in proven acreage and constitute a fair and reasonable reserve without which a pipeline system would be of little value. Such leases are located within a reasonable range of the pipeline system and none of such reserves are located [fol. 389] so as not to be of full value to the pipeline companies, those located in Mississippi being in the vicinity of pipelines with whom such pipeline companies may at any

time exchange gas to the advantage of both; and supplies and reserves limited to a period of approximately five years would be wholly inadequate to guarantee continued and uninterrupted service. Maintenance of such gas reserves is not only good business judgment, but an absolute necessity to guarantee adequate and uninterrupted service and a matter in which the City Council should not be permitted to substitute its business judgment for that of the business management of the said pipeline companies.

(d) That the sum of \$63,666.28 amortization of the cost of nonproducing leases should not be charged into the operating expense of the pipeline companies, because such leases have not been drilled and proven to be nonproductive, and the charge is an amortization of the cost of acquiring such leases and not incurred in connection with the property now used and useful to the present consumers of gas; whereas, the cost of acquiring such leases amortized over the primary term thereof is a fair and proper charge and necessary to maintain adequate reserves to insure continued and uninterrupted service, dictated by good business judgment and without which the value of the properties of said pipelines would be greatly diminished. Such properties are both used by and useful to the present consumers of gas. [fol. 390] None of such reserves have been acquired without first subjecting them to critical geological investigation and analysis.

(e) That the charges for bad debts and adjustments should be reduced to the amounts actually charged off; whereas, the accrual of such charges is proper and should be included in the expenses for the reason that such accruals are results arrived at by experienced accountants and credit men taking into consideration the experience of the companies over a term of years, and it is a safe and proper method of arriving at proper charges for bad debts and adjustments of such a system as the pipeline companies operate.

(f) That the annual charge of five per cent depreciation on the transportation and general property, excluding producing property should be reduced to two per cent; whereas, a depreciation allowance of five per cent on the value of the depreciable property is fair, just and reasonable and

the allowance of two per cent depreciation, and the finding of the value of \$24,132,581.53, as the depreciable property is unfair, unjust, unreasonable and arbitrary. The actual experience of the pipeline companies demonstrates that the business of producing and transporting gas is a hazardous one, resulting in the continual replacement of pipelines and building, of new lines, exhaustion of gas fields and reserves, and the five per cent depreciation is not more than reasonable, fair and just, and that a less depreciation allowance is arbitrary unjust and unreasonable.

[fol. 391] The sum of \$24,132,581.53 found by the City Council as the value of the depreciable property of the pipeline companies is arbitrary and unreasonable; it wholly disregards contractor's fee.

The amount of depreciation which should be allowed is not affected by the net balance shown in replacement reserves on the books of the pipeline companies. The actual book charges against reserves in particular years have no relation to the amounts which should be allowed annually against expenses and credited to depreciation reserve account, because such actual book charges are not averaged over a life cycle of the entire properties because such experience is not available to the pipeline companies, a large portion of the system of said companies having been built since 1928.

(g) That the present fair value of the property of the pipeline companies, upon which they are entitled to earn a return is \$27,334,274.28; whereas, as hereinabove shown, the fair value as of June 1, 1934 on the basis of cost of reproduction new less depreciation, is not less than \$35,041,826.21.

The City Council also excluded, in arriving at its said figures, the sum of \$4,267,120.80, going concern value which represents cost of attaching and developing the business and is measured by the fixed charges for interest, depreciation and taxes on those portions of the property which are idle or unused during the development period for the time that such portions are idle and unused, and which is a value [fol. 392] that an established business has over a business projected but not established.

The City Council also reduced the sum of \$1,404,382.06 working capital, to \$500,000.00, based on its finding that the

expenses of the pipeline companies for a sixty day period would be such sum. The actual experience of said pipeline companies and their estimated needs for the future in maintaining and operating their properties show that the figure found by the City Council is inadequate and insufficient to meet the needs of said pipeline companies.

The City Council also excluded in arriving at its valuation, the sum of \$1,123,505.65, cost of financing, which overlooks the actual experience of these and other companies in projecting an enterprise such as this pipeline system and takes into no account the actual experience of marketing securities in order to procure capital with which to construct and build such enterprises.

(h) That the rate of return of eight per cent on the valuation of the transportation and general properties of the pipeline companies should be reduced to six per cent because of depressed business conditions and because the pipeline system of these companies was built to carry a greater volume of gas than it is now carrying and because its business is no longer hazardous; whereas, the percentage of eight per cent is just and reasonable. The experience of these pipeline companies and others in the business [fol. 393] of producing and transporting natural gas shows that it is a hazardous enterprise and its sources of supply are constantly being depleted and changed and its pipeline system moved, replaced and rearranged; that a less rate of return would result in impairing its ability to procure capital, make its securities unattractive and result in impairing its ability to render the gas service required by plaintiff, to its detriment and that of its customers.

The said City Council, in arriving at its said figures, took into account the experience of said pipeline companies for the year 1930, but based its valuations on prices of 1932, which were very much lower than the prices prevailing in 1930. If the figures of 1930 should be used, the prices likewise of 1930 for valuation purposes should be used.

The rates of return as found by the City Council, as hereinabove shown, were based on erroneous deductions and allowances, and for that reason are incorrect and arbitrary and without foundation in fact.

(i) That the amounts paid Henry L. Doherty & Company by defendant for services rendered during the years

1930, 1931 and 1932, amounting to \$5,377.52, \$5,366.21 and \$4,577.07, should be stricken from the expenses of defendant at Texarkana, Texas for the reason that the cost of rendering such services, to Henry L. Doherty & Company was not shown; whereas, for the reasons set forth with respect to the services rendered to the Arkansas Louisiana Pipeline Company and the Reserve Natural Gas Company [fol. 394] of Louisiana, under similar contracts with said Henry L. Doherty & Company, such charges are fair, reasonable, just and proper for the services rendered and a matter of agreement, as to which the sound business judgment of the management of defendant should not be disregarded.

(j) That the proper method of calculating the cost to defendant of gas purchased from the pipeline companies is not the agreed price nor the cost of the service based on use, but should be fixed on the basis of the proportion of total expenses and return on property which the total gas sold to consumers in Texarkana, Texas, bears to the total gas sold by the pipeline companies to all consumers; whereas, the proper method of calculating such cost to defendant, if not upon the agreed price which defendant is compelled to pay, is not less than the actual cost of the service based on use; and the allocation based on the proportion of gas sold to consumers in Texarkana, Texas, to the total volume of gas sold by said pipeline companies is arbitrary, unsound and illegal.

(k) That there should be deducted from the value of the property or rate base, upon which a return should be allowed, the sum of \$60,000.00 for going concern value; whereas, such sum represents loss by depreciation and interest on idle plant, cost of training men, taxes, and in brief, what is known as cost of attaching business, or a value which an established business has over a prospective one.

[fol. 395] (l) That there should be deducted from the value of the property or rate base, upon which a return should be allowed, the sum of \$20,000.00 for cost of financing; whereas, such sum is less than the actual cost of securing capital employed in the property and business of defendant in serving its customers in Texarkana, Texas, and is a proper charge in arriving at the value of the property used

and useful in the gas service of defendant in the City of Texarkana, Texas.

(m) That the depreciation rate of five per cent on depreciable property of defendant in Texarkana, Texas, should be reduced to two per cent; whereas, the depreciation allowance of five per cent on the valuation of the depreciable property of defendant is fair, just and reasonable; and a less rate, unreasonable and wholly arbitrary. The actual experience of defendant, its predecessors and others demonstrates that the business of distributing gas in Texarkana, Texas, due to shifting of lines, development of service and other factors, requires a calculation of rate of depreciation of not less than five per cent and that a less depreciation allowance is unreasonable and arbitrary.

(n) That no allowance should be made for federal income tax, either in the expenses of the pipeline companies or of defendant, because such tax has not actually been paid; whereas, the assessment for such tax depends upon net earnings and the effect of the right to file consolidated returns with affiliated corporations avoiding the payment of [fol. 396] income taxes by offsetting gains of some with losses of others, does not destroy the initial liability for such tax. It is an expense of the earning corporation and must be, as such, taken into account.

(o) That the rate of return of defendant upon the fair valuation of its property used and useful for serving its customers in Texarkana, Texas, is six per cent; whereas, a rate of return less than eight per cent will result in impairing the ability of plaintiff to procure capital and to render the gas service required to its customers in Texarkana, Texas.

(p) That the City of Texarkana, Texas, is entitled to free gas for use at its municipal buildings, jails and fire stations; whereas, the furnishing of free gas to said city for such purposes would further decrease the revenues of defendant and result in further loss and confiscation, and that said city is wholly without right to require such service free of cost or without paying the proper rates and charges therefor.

(q) That the amounts of unaccounted for gas are in excess of the amount of gas that would be unaccounted for in a

properly maintained plant, and that the company should not be allowed to charge against its consumers in Texarkana, Texas, the cost of gas which it allows to escape from its distributing system in excess of the proper and normal amount; whereas, the work necessary to bring the distribution system [fol. 397] of plaintiff at Texarkana, Texas, to the standard so found by the said City Council consists in repairs and not in new construction and the revenues of said distribution system have not been sufficient since defendant's acquisition thereof in 1928, under the rates existing and charged since such date to return to defendant its bare expenses and a sum necessary for such purposes and defendant has been and will be unable to make such repairs as may be necessary to effect such result unless permitted to charge the proposed or higher rates; that is the standard leakage found by the said City Council can be properly attained only by proper increase in the rates presently fixed by the resolutions and orders complained of. The cost of such repairs is a proper expense chargeable against revenues and not a capital expense and should and must be charged to and borne by those receiving the service.

XXXIII

Defendant avers that it is suffering a loss in excess of \$350.00 per day by reason of failure to receive sufficient revenue from its operations in the City of Texarkana, Texas; that its revenues received from the operation of its properties in Texarkana, Texas, are insufficient to pay its operating expenses and that such losses amount to daily confiscation of plaintiff's property; that losses and damages sustained before the hearing cannot be re-couped.

[fol. 398]

XXXIV

That the Fourteenth Amendment of the Constitution of the United States of America provides that no state shall deprive any person of property without due process of law, and guarantees to every person the equal protection of the laws. That defendant is entitled to the benefit and protection of said constitutional provision, and it now invokes and urges same as against the actions of said City of Texarkana, Texas, in the distribution and sale of gas in said city sufficient to prevent the confiscation of its said property and to earn a reasonable return above its necessary expenses upon

the fair value of its property used and useful in rendering such services.

XXXV

Defendant states that the effect of the attempts of the city to prevent it from charging the rates filed and applied for, is to impose upon the defendant a daily loss amounting to daily confiscation of its property; that any lower rates will fail to yield revenue sufficient to pay expenses of operation, depreciation, taxes and a reasonable return upon the fair value of its said property. That the attempt of the city to force it to charge less rates than those applied for, if successful, will deprive it of its property to its damage in a sum or value exceeding three thousand dollars (\$3,000.00), exclusive of interest and costs, without due process of law, and deny defendant the equal protection of the laws; that [fol. 399] under the Fourteenth Amendment to the Constitution of the United States, no state may deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; and defendant does now plead and invoke said provision of the United States Constitution for the protection of its property, and the Constitution and laws of the State of Texas; the attempts of the city to keep defendant from putting into effect less rates than that applied for, are violative of these provisions of the United States Constitution, and defendant urges said constitutional provisions as a protection against said efforts of said plaintiff.

XXXVI

Wherefore, upon consideration of its answer and counterclaim defendant prays that the petition of plaintiff be denied and that Sections VIII-A and IX of the franchise ordinance be declared null and void, and be cancelled, and that said contract be construed to merely mean that the rates specified should continue until changed, either by an appropriate action on the part of the city or upon application of the defendant, and that it be further held that the rates filed by it are lawful rates; that the claims may by the plaintiff be cancelled as cloud upon the title of this defendant to its distribution plant in the City of Texarkana, Texas; that its right to increase its rates as per schedule filed by it be sustained; [fol. 400] that defendant recover all costs herein in-

curred; and defendant prays for such other and further relief, general and special, to which it may be entitled.

H. C. Walker, Jr., W. H. Arnold, Jr., King, Mahaffey,
Wheeler & Bryson, Attorneys for Southern Cities
Dist. Co.

EXHIBIT "A" TO ANSWER

Texarkana, Texas,
November 7, 1933.

To the Honorable Mayor and City Council of the City of
Texarkana, Texas:

In re Notice and Application of Southern Cities Distribut-
ing Company Filed November 3rd, 1933

MOTION FOR PROMPT HEARING AND ACTION

I

Applicant, Southern Cities Distributing Company, asks for immediate preliminary hearing and action by the Council upon that part of its application, filed November 3rd, 1933, which asks for immediate authority to place into effect the new schedule of rates contained in its application, pending final hearing. Applicant states that it is essential, to avoid daily confiscation of Applicant's property, that the Council have a prompt meeting and hearing and temporarily authorize the new rates to be placed into immediate effect pending final hearing upon reasonable bond or upon Applicant's putting up the difference in the rates in a deposit [fol. 401] to be named. Applicant is prepared to present its evidence at once.

Applicant further requests the Council to hear it upon this part of the application and not to delay the same; and states that, in the absence of supersedeas, stay, and temporary relief, its application for prompt action would fail to produce relief to which it is entitled and that postponement would amount to denial of its application for temporary relief as much as express denial. Applicant now requests and insists that it be accorded a preliminary hearing to show the damage which is being done each day to applicant's property and to show the necessity of immediate

action by the Council. If Applicant does not place in effect the new rates immediately, it will have no remedy for recovering each day's loss until such time as obtains final relief.

II

Applicant hereto attaches affidavit showing the necessity of immediate preliminary consideration and action by the Council authorizing the Applicant, upon security, to place the new rates into immediate force and effect, pending final hearing, and hereby requests that the Council have a meeting on November 10, 11, 13 or 14, 1933, to pass upon this part of the application and grant stay of the existing rates.

III

Wherefore, Applicant prays: That the Council hold prompt preliminary hearing and grant that part of its [fol. 402] application requesting action providing for temporary relief, under bond, supersedeas, or other method; and that the amount of the bond be fixed, or a depository be named in which to impound the difference between the present rates and the rates applied for.

(Signed) H. C. Walker, Jr., W. H. Arnold, Jr., King, Mahaffey, Wheeler & Bryson, Attorneys for Applicant, Southern Cities Distributing Company.

[File endorsement omitted.]

Duly sworn to by Jno. J. King. Jurat omitted in printing.

[fol. 403] PLAINTIFF'S MOTION TO STRIKE OUT ANSWER AND COUNTERCLAIM- September 24, 1934

Plaintiff's motion to strike out said answer and counterclaim. Do not copy, refer to Item 11 above.

MOTION TO RECORD CHANGE OF NAME OF DEFENDANT—January 18, 1935

Motion to Record Change of Name of said defendant to Arkansas Louisiana Gas Company. Do not copy, refer to Item 12 above.

**ORDER SUBSTITUTING NAME OF DEFENDANT TO ARKANSAS
LOUISIANA GAS COMPANY—January 18, 1935**

Order substituting the name of Arkansas Louisiana Gas Company in lieu of Southern Cities Distributing Company and changing the style of cause to: "City of Texarkana, Texas v. Arkansas Louisiana Gas Company, and Lon A. Smith, C. V. Terrell and Ernest O. Thompson, Members of the Railroad Commission of Texas." Do not copy, refer to Item 13 above.

ORDER OF CONSOLIDATION—September 18, 1935

Order of Consolidation. Do not copy, refer to Item 14, above.

**[fol. 404] SUPPLEMENTAL BILL OF CITY OF TEXARKANA, TEXAS
—December 30, 1936**

Supplemental Bill of City of Texarkana, Texas. Do not copy, refer to Item 15 above.

SEPARATE AMENDED ANSWER OF DEFENDANT—July 14, 1937

Separate Amended Answer of defendant, Arkansas Louisiana Gas Company, to Plaintiff's Original and Supplemental Petition, and Counterclaim of Arkansas Louisiana Gas Company. Do not copy, refer to Item 16 above.

**MOTION THAT DEFENDANT'S PLEADING FILED JULY 14, 1934,
BE RECOGNIZED AND ORDERED APPLICABLE TO BOTH CASES—
July 19, 1937**

Motion that defendant's pleading filed July 14, 1934 be recognized and ordered applicable to both cases. Do not copy, refer to Item 17 above.

**ORDER RECOGNIZING DEFENDANT'S PLEADING FILED JULY 14,
1934, ETC.—July 19, 1937**

Order recognizing defendant's pleading filed July 14, 1937 and ordering that it be taken to apply as defendant's addi-

tional pleadings in both cases 106 and 109 In Equity. Do not copy, refer to Item 18 above.

[fol. 405] MOTION OF PLAINTIFF TO STRIKE "SEPARATE AMENDED ANSWER OF DEFENDANT," ETC.—July 19, 1937

Motion of plaintiff to strike "Separate Amended Answer of Defendant, Arkansas Louisiana Gas Company to Plaintiff's Original and Supplemental Petition; and Counterclaim of Arkansas Louisiana Gas Company." Do not copy, refer to Item 19 above.

FINAL DECREE—July 30, 1937

Final Decree. Do not copy, refer to Item 20 above.

IN UNITED STATES DISTRICT COURT

No. 106 and No. 109, in Equity, Consolidated

[Title omitted]

MOTION OF ARKANSAS LOUISIANA GAS COMPANY FOR SEVERANCE AND GRANT OF SEPARATE APPEAL—Filed September 22, 1937

Now come Arkansas Louisiana Gas Company, one of the defendants in the above entitled causes, and show to the [fol. 406] Court that Arkansas Louisiana Gas Company has heretofore given all the other parties affected by the final decree herein reasonable notice that this defendant would on 23 day of September, 1937 at 11 o'clock A. M., or as soon thereafter as these interveners can be heard, apply to His Honor, Judge Randolph Bryant, for an order allowing them an appeal in said causes from the final decree entered therein rendered, to the United States Circuit Court of Appeals for the Fifth Circuit, and requesting them to join in such appeal; that all of said parties so affected by said decree have failed and refused and do now fail and refuse to join these interveners in such appeal, and this defendant now here offers proof of the facts hereinbefore stated.

Wherefore, this defendant moves the Court for an order allowing it to an appeal separately in these causes.

John J. King, H. C. Walker, Jr., W. C. Fitzhugh,
W. H. Arnold, Jr., Solicitors for Arkansas Louisiana
Gas Company.

Copy received and notice accepted 9-16-37. B. E. Carter,
E. B. Levee, Jr., Attorneys for City of Texarkana, Texas.

[File endorsement omitted.]

[fol. 407] IN UNITED STATES DISTRICT COURT

No. 106 and No. 109, in Equity, Consolidated

[Title omitted]

ORDER OF SEVERANCE—Filed September 23, 1937

Now on this 23 day of September, 1937 comes defendant Arkansas Louisiana Gas Company and presents its motion for severance. The court finds that due notice has been given to all the other parties affected by the final decree from which this appeal is prayed. The court sustains the motion of Arkansas Louisiana Gas Company and orders that said defendant have leave to appeal without joining the other defendants in said appeal and orders that severance be and the same is hereby granted, and Arkansas Louisiana Gas Company shall have the right to appeal in these causes without joining any of the other parties thereto in such application for appeal.

Randolph Bryant, United States District Judge.

O.K. as to form: E. B. Levee, B. E. Carter, Attorneys for
City of Texarkana, Texas.

[fol. 408] [File endorsement omitted.]

PETITION FOR APPEAL, ASSIGNMENTS OF ERRORS, BOND, ORDER
GRANTING APPEAL, CITATION IN APPEAL, SERVICE AND
PRAECIPE—September 23, 1937

Petition for Appeal, Assignment of Errors, Bond, Order
Granting Appeal, Citation in Appeal, Service, this Praecipe.
Do not copy, refer to Item 21 above.

IN UNITED STATES DISTRICT COURT

In Equity. No. 106

[Title omitted]

PLAINTIFF'S PETITION FOR DISMISSAL WITHOUT PREJUDICE—
Filed May 21, 1934

Comes the plaintiff, the City of Texarkana, Texas, and moves the court to dismiss this suit without prejudice at plaintiff's costs.

Ed. B. Levee, City Attorney; B. E. Carter, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 409] IN UNITED STATES DISTRICT COURT

In Equity. No. 106

[Title omitted]

ORDER OF DISMISSAL—May 22, 1934

Dismissed on application of plaintiff without prejudice at plaintiff's cost.

IN UNITED STATES DISTRICT COURT

In Equity. No. 106

[Title omitted]

ORDER OF CONSOLIDATION AND ORDER OF DISMISSAL—Filed
September 21, 1935

On May 21st. 1934, there was filed in this cause a motion by the plaintiff that this suit be dismissed without prejudice, at plaintiff's costs, and thereupon the defendant appeared [fol. 410] and objected to the dismissal of said suit insofar as its cross action was concerned, and, at that time, the

Court announced that he would take the matter under further consideration. Thereafter, on the 13th day of June, 1934, at Sherman, Texas, the plaintiff being present by Ed. B. Levee, Jr., and B. E. Carter, its attorneys, and the defendant being present by W. H. Arnold, Jr., and Judge John J. King, its attorneys, the Court announced that he would not dismiss this suit insofar as the cross action contained in the defendant's answer was concerned, and that, if the plaintiff desired, it might reinstate its cause of action, and that the Court was willing to consolidate said cause No. 106 in Equity with cause No. 109 in Equity then pending in the Texarkana Division of this Court, wherein the City of Texarkana, Texas, was plaintiff, and the Southern Cities Distributing Company, which is now the Arkansas-Louisiana Gas Company, was defendant. Thereupon the plaintiff asked the Court to note its exceptions to the order refusing to dismiss the whole of said cause No. 106, which is done. The plaintiff now informs the Court that, in view of the refusal of the Court to dismiss the whole of said cause No. 106, it desires to have its original cause of action reinstated and to have said cause No. 106 consolidated with said cause No. 109, and the plaintiff further requests the Court that the motion to strike the answer and cross complaint of the defendant, which has been filed in cause No. 109, should be considered and treated as going to and being filed with reference to the answer and cross complaint of the defendant in cause No. 106.

It is therefore, by the Court considered, ordered, adjudged and decreed that the petition of the plaintiff in this [fol. 411] cause, No. 106, to dismiss this suit without prejudice be overruled and denied insofar as the cross complaint or cross-action of the defendant is concerned and that any memoranda or orders heretofore entered on the docket or records of this Court to the contrary be corrected. The plaintiff, at the time, excepts to this order and asks that its exceptions be noted of record, which is done.

It is further considered, ordered, adjudged and decreed by the Court that the plaintiff in this cause No. 106 in Equity be, and it hereby is, permitted to reinstate its cause of action in this suit in view of the fact that the defendant's cross action is not dismissed, and the plaintiff having asked that this be done, its cause of action in this suit is hereby reinstated.

It is further considered, ordered, adjudged and decreed by the Court that this suit, No. 106 in Equity, wherein the City of Texarkana, Texas, is plaintiff, and the Arkansas-Louisiana Gas Company, formerly the Southern Cities Distributing Company is defendant, be and it hereby is consolidated with cause No. 109 in Equity, now pending in this Court, wherein the plaintiff is the same party as the plaintiff in this suit, and the defendant is the same party as the defendant in this suit, and that said two actions proceed under the number of 109 in Equity and under the style of City of Texarkana, Texas, plaintiff vs. Arkansas-Louisiana Gas Company, defendant.

It is further considered ordered, adjudged and decreed by the Court that the plaintiff's request that its motion to strike out the answer and counterclaim of the defendant in No. 109 in Equity be considered as going to and applying to the answer and counterclaim of the defendant in this suit, be granted and that said motion to strike the answer and [fol. 412] counterclaim in No. 109 in Equity is treated and considered as going to and applying to the answer and counterclaim of the defendant in No. 106 in Equity, as well as in 109 in Equity.

This the 18th day of September, 1935.

Randolph Bryant, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Nos. 106 and 109, in Equity, Consolidated

[Title omitted]

PETITION OF CITY OF TEXARKANA, TEXAS, FOR APPEAL—Filed
September 23, 1937

To the Honorable Randolph Bryant, Judge of said Court:

Comes the City of Texarkana, Texas, and feeling itself aggrieved by the decrees and orders of this Court, hereby prays that an appeal may be allowed to it from said decrees and orders to the United States Circuit Court of Appeals for the Fifth Circuit and, in connection with this petition, [fol. 413] it presents herewith its assignment of errors.

Said city also prays that the Court make such order as may be necessary fixing the security for costs to be given by said city in the event it shall fail to sustain the appeal.

Ed B. Levee, Jr., B. E. Carter, Attorneys for City of
Texarkana, Texas.

Copy received 9-22-37. W. H. Arnold, Jr.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Nos. 106 and 109, in Equity, Consolidated

[Title omitted]

ASSIGNMENT OF ERRORS—Filed September 23, 1937

Comes the City of Texarkana, Texas, and in connection with its petition for appeal alleges that the orders and [fol. 414] decrees of this Court herein are erroneous and unjust to said city in the following particulars, which it assigns as errors, to-wit:

1. The Court erred in its order and decree entered herein on September 21, 1935, in setting aside the dismissal of suit No. 106 in its entirety, and in refusing to permit the dismissal of said suit No. 106 in its entirety.
2. The Court erred in cause No. 109 in overruling the plaintiff's response to the petition for removal and overruling the plaintiff's motion to remand this cause to the District Court of Bowie County, Texas, and in enjoining the plaintiff from further proceeding in said District Court in said cause No. 109.
3. The Court erred in its final decree in finding that no refunds were due to the plaintiff or to the gas consumers in the City of Texarkana, Texas, for the periods of time prior to December 1, 1933, and in rejecting plaintiff's demands for refunds for such period.
4. The Court erred in its final decree in finding that no reduction in rate should be ordered in the City of Texarkana, Texas, at the present time, and in rejecting plain-

tiff's demand for such rate reduction on the ground that it was premature.

5. The Court erred in finding that the City of Texarkana, Texas, and the consumers of gas therein are not entitled to any refund for rates collected from and after February 16, [fol. 415] 1934, and in dismissing plaintiff's bill insofar as it seeks such refunds for such period and insofar as it seeks a present reduction in rates.

6. The Court erred in refusing to order refunds to the consumers in Texarkana, Texas, for the period from June 13, 1930, to December 1, 1933.

7. The Court erred in refusing to order refunds to the consumers in Texarkana, Texas, for the period from February 16, 1934, to the present time.

8. The Court erred in refusing to order the gas company to place in effect in Texarkana, Texas, rates which are now in effect in Texarkana, Arkansas.

Wherefore, the City of Texarkana, Texas, prays that the decree of the United States District Court for the Eastern District of Texas be modified in the above respects and that it have judgment in all things as prayed by it in this Court.

Ed B. Levee, Jr., B. E. Carter, Attorneys for City of Texarkana, Texas.

Copy received 9-22-37. W. H. Arnold, Jr.

[File endorsement omitted.]

[fol. 416] Bond on Appeal for \$1,000.00, approved and filed October 4, 1937, omitted in printing.

[fol. 417] IN UNITED STATES DISTRICT COURT

Nos. 106 and 109, in Equity, Consolidated

[Title omitted]

ORDER GRANTING APPEAL—Filed September 23, 1937

On this the 23rd day of September, 1937, comes the City of Texarkana, Texas, and presents its petition for an appeal

herein and presents with its petition its assignment of errors. The Court finds that such appeal should be granted and that bond should be fixed in the sum of one thousand (\$1,000.00) dollars.

It is therefore, by the Court, considered, ordered, adjudged and decreed that the City of Texarkana, Texas, be and it hereby is granted an appeal to the United States Circuit Court of Appeals for the Fifth Circuit and that said [fols. 418-419] city furnish bond to the Arkansas Louisiana Gas Company in the sum of one thousand (\$1,000.00) dollars to answer all costs if it fail to sustain said appeal.

Randolph Bryant, Judge.

Copy received 9-22-37. W. H. Arnold, Jr.

[File endorsement omitted.]

Citation, in usual form, showing service on Jno. J. King, filed September 30, 1937, omitted in printing.

[fol. 420] IN UNITED STATES DISTRICT COURT

Nos. 106 and 109, In Equity, Consolidated

[Title omitted]

PRAECIPE OF CITY OF TEXARKANA, TEXAS, FOR TRANSCRIPT—
Filed September 27, 1937

The City of Texarkana, Texas, acknowledges the receipt of a copy of the praecipe for transcript prepared by the Arkansas Louisiana Gas Company and requests that the following changes and additions be made to the transcript as order in said praecipe:

1. Following item No. 10 of the gas company's praecipe, please insert as item No. 10a a copy of the city's petition for dismissal without prejudice in cause No. 106, filed on May 21, 1934.

2. Immediately following said petition for dismissal in said cause and before item No. 11 in the gas company's

praecipe, please insert a copy of the order made and entered on May 22, 1934, in cause No. 106 dismissing said cause without prejudice. Said order may be found at page 165 of Vol. 2 of the Equity Minutes of this Court.

3. Please copy in full item No. 14 shown on the gas company's praecipe, same being the order of consolidation in cases No. 106 and No. 109. The gas company, in its praecipe, asks that this order should not be copied but should be abbreviated. The city requests that this order be copied in full.

[fol. 421] 4. The gas company requests in its praecipe, item No. 33, that the plaintiff's motion to strike out the answer and counter-claim of the gas company should not be copied. The city requests that it be copied.

(Request withdrawn. B. E. C. E. B. L., Jr.)

5. Please include in the transcript the petition of the city for appeal, assignment of errors of the city, bond of city, order granting appeal to city, citation in the appeal of the city and service thereof, and this praecipe.

The City requests that the above changes and additions be made to the transcript as ordered by the gas company.

This September 22, 1937.

Ed B. Levee, Jr., B. E. Carter, Attorneys for City of
Texarkana, Texas.

Receipt acknowledged of a copy of the above praecipe this the 22 day of September, 1937.

W. H. Arnold, Jr., Attorney for Arkansas Louisiana
Gas Company.

[File endorsement omitted.]

[fol. 422] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 423] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of April 19th, 1938

No. 8646

ARKANSAS LOUISIANA GAS COMPANY
versus

CITY OF TEXARKANA, TEXAS

(And Reverse Title)

On this day this cause was called, and, after argument by Benjamin E. Carter, Esq., for appellee and cross-appellant, and W. C. Fitzhugh, Esq., and William H. Arnold, Jr., Esq., for appellant and cross-appellee, was submitted to the Court.

[fol. 424] OPINION OF THE COURT—Filed June 3, 1938

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
FIFTH CIRCUIT

No. 8646

ARKANSAS LOUISIANA GAS COMPANY
versus

CITY OF TEXARKANA, TEXAS

(And Reverse Title)

Appeal and Cross-Appeal from the District Court of the
United States for the Eastern District of Texas

(June 3, 1938)

Before Foster, Sibley and Hutcheson, Circuit Judges

HUTCHESON, Circuit Judge:

What is in question here is the validity and enforceability of, and the relief to be granted under, Section IX¹ of the

Note 1. It was provided by Sec. IX:

"If grantee shall be finally compelled to, or should voluntarily place in any rates in the City of Texarkana Arkansas, less than the rates granted by the ordinance, then and

June 18, 1930 ordinance under which appellant holds and operates its franchise in Texarkana, Texas.

Texarkana, Texas, and Texarkana, Arkansas, are twin cities under separate state governments. Each has its [fol. 425] separate and complete political and corporate structure. In 1923 one gas company, the Southwestern Gas and Electric Company, served both cities, under a separate and distinct franchise as to each. Separate ordinances as to each city fixed substantially the same rates in each for domestic and commercial consumption. Article (e) of the Texas city franchise provided that the Utility "would not, nor would its successors and assigns, charge a greater sum for furnishing gas to domestic and commercial consumers in the city of Texarkana, than it at the same time charges and collects from like consumers, for similar services in Texarkana, Arkansas." In 1928 the franchises of the Utility in the two cities were assigned to the Southern Cities Distributing Company, now Arkansas Louisiana Gas Company, the appellant. In 1930 appellant applied to the Texas city Council for, and litigation was begun as to, increased rates over those fixed in 1923. After the Council had denied the application, and an appeal had been taken to the Railroad Commission, the City and the Gas Company reached and embodied in a new franchise an agreement for rates considerably higher than the 1923 rates they replaced. These rates, while differing in some particulars, were the same in substance as those which at about the same time appellant and the Arkansas city had agreed upon and fixed. The Texas city agreement provided that it should become effective upon written acceptance by the grantee. On June 18, 1930 this acceptance was filed.

No sooner had the 1930 agreements been effected than trouble began. In the Arkansas city the electors petitioned for a referendum on the 1930 ordinance. Litigation in state and Federal courts followed. When it was all over the 1930 ordinance was repealed, and on December 1, 1933, there was a court order making the 1923 rates effective in the Arkansas city, and requiring refunds to Arkansas city consumers back to 1930 on the basis of those rates. In the

thereupon the lessened rate shall apply in the City of Texarkana, Texas, and Grantee shall not be authorized or permitted to charge and collect any higher rate."

[fol. 426] meantime, appellant, on October 23, 1933, applied to the Arkansas city Council for an increase in rates. That Council, on November 14, 1933, served notice that it would consider reducing the rates from 45¢ to 40¢. On December 22, 1933, appellant's schedules were rejected by the Council, the 40¢ rate was thereafter ordered in, and defendant filed its suit in the Federal court in Arkansas to prevent the enforcement of the 1923 or 45¢ rate, and the proposed reduction to 40¢ as confiscatory, and to enjoin the December 22 ordinance refusing to grant the October 23 application for increases. The refunds ordered were, however, made and from December 1, 1933 to February 16, 1934, when the Arkansas Council prescribed a 40¢ rate, and appellant obtained its restraining order, the Arkansas city consumers were billed on the 1923, or 45¢ rate. Thereafter, and until December 1936, the October 1933 rates appellant had proposed were put in force and maintained under injunction and bond. The District Court, on final hearing, permanently enjoined the 40¢ rate of February, 1934, dissolved the injunction as to the 1933 rates, and gave judgment on the intervention and bond for reparation, based on said rates. Appellant, without the benefit of injunction, or other suspensory order, except as to the judgment for refund in February, 1934, appealed from this decree, and the 1923 rate was again in effect, pending final disposition of the appeal, which is as yet undisposed of.

While these things were transpiring on the Arkansas side of the line, there was no quiet on the Texas or western front. Rumblings of discontent over there, with the rates charged them, as against those being contended for in Arkansas, grew ever louder, until finally, in December 1933, the storm broke in the form of a resolution directing appellant to comply with Article IX of the franchise agreement, to place in effect in the Texas city the 1923 rates which, as the result of the decree of December 1, 1933, it was then collecting in Arkansas, and to make refunds to its Texas consumers as it [fol. 427] was doing in Arkansas, back to 1930 on the basis of the 1923 rates.

Appellant, on its part, was not idle. Moving *pari passu* on both fronts, on November 3, 1933 it applied to the Texas city Council to put in force there as of November 23, the same schedule of increases as those it had already, in October, 1933, applied for in Arkansas. On November 4 it filed

notice that it would, at the end of one year, apply for an increase over those then proposed. On November 14, 1933, the Texas city Council passed a resolution declaring that it was willing, without waiving its rights under the franchise, to consider whether the existing rates were unreasonable, and calling upon the company to furnish certain information. This information supplied, the Council in January, after a hearing on the application, adopted a resolution refusing to waive any of its franchise rights, or to grant an increase. In the meantime, on November 16, the Texas city sued appellant in the state court, and obtained a temporary injunction preventing it from putting into effect the increase of rates it had applied for, without having given the one year's notice required by Sec. VIII(a) of the franchise.² This suit was removed to the Federal court where appellant answered and counterclaimed that Sec. VIII(a) was invalid, that it was pursuing the proper course to secure the rate relief it was seeking, and prayed that the temporary injunction be dissolved, that Sec. VIII(a) be cancelled, and for general relief.

On January 15, 1934, the City amended to allege that if Sec. VIII(a) was invalid, the defendant still was not entitled to increase its rates, because it was not proceeding as required by the Texas statutes. In addition, invoking Sec. IX of the 1930 franchise ordinance, it sued to specifically enforce it, and for a decree requiring defendant to place in effect in the City of Texarkana, Texas, the lower rates then being charged in the Arkansas city, to wit, 45¢, the 1923 rate, and to make reparation to the Texas city consumers back to 1930, based on that rate. On March 9, defendant replied to the City's amended petition by answer and counterclaim, reaffirming its position that Sec. VIII(a) was invalid, and that it was proceeding properly to get relief from the confiscatory rates, and alleging that Sec. IX was invalid, and that if valid and enforced, it did not entitle plaintiff to the relief claimed. It alleged that for a considerable part of the time it was supplying gas in the Arkansas city not at the 1923 rates, but at rates higher than those charged in the Texas city, and finally, that the rates fixed in

Note 2. This section provided that the city would not apply for a reduction, the company for an increase, except upon a year's notice.

the 1930 Texas city ordinance were confiscatory. It prayed for a dismissal of the temporary injunction, the cancelling of Secs. VIII(a) and IX, and for general relief. On May 22, 1934, the City secured an order of dismissal of its suit then pending, and on the next day filed substantially the same suit as a new proceeding in the state court. This suit was also removed to the Federal court, where, that court holding that the dismissal of the City's petition in the first suit had not effected dismissal of defendant's counterclaim, the City obtained a reinstatement of its first suit, and an order consolidating the two suits for trial. More than a year having elapsed since the filing of the suit, the issues as to Sec. VIII(a) having become moot, and the parties having copiously and frequently amended, the City, on December 30, 1936, filed a supplemental bill in which the events in Arkansas were set out, and the prayer was that Sec. IX be enforced, and under it defendant ordered—

“(1) to place in immediate effect in Texarkana, Texas, certain Arkansas rates.

(2-3) to pay reparations, based on the Arkansas rates from June 13, 1930 to date of decree divided into three periods of time;

[fol. 429] (a) June 13, 1930 to February 16, 1934;

(b) February 16, 1934 to December 4, 1936;

(c) December 4, 1936, to date of decree;

(4) that for (a) and (c) periods the reparations be distributed to the gas consumers in Texarkana, Texas,

(5) that reparations for (b) period be held in court, conditioned on the outcome of the appeal in the Arkansas rate case.”

On July 14, 1937, defendant filed a separate amended answer and counterclaim, carrying forward all of its defenses, and particularly that Secs. VIII (a) and IX were void, and that if effective, Sec. IX did not entitle plaintiff to any of the relief it prayed. Thereafter, the City's motion to strike appellant's answer and counter claim was sustained, and a decree was entered, finding and adjudging. (1) that Section IX was a valid and binding contract, and that it obligated appellant to place in effect in the Texas city, after, but not before it had been finally compelled to, or should

voluntarily, place them in effect in Texarkana, Arkansas, any rates effective in that city which were less than those provided for the Texas city by the 1930 ordinance; (2) that so construed, Section IX was applicable to the period from collected from its consumers in Texarkana, Arkansas, the December 1, 1933, to February 16, 1934, when defendant 1923 rate, and required refunds to the Texas consumers for that period on the basis of the Arkansas rate; (3) that so construed, it was not applicable to the period from June 16, 1930 to December 1, 1933, during which defendant had collected from its Arkansas consumers the equivalent of the rates collected from the Texas consumers, and the Texas consumers were not entitled to refunds for that period; (4) that so construed, since litigation has been since February 16, 1934, and still is, pending over the Arkansas rates, [fol. 430] and defendant has not, for that period, voluntarily put in, nor been finally compelled to put in, rates less than those prescribed under the 1930 ordinance for the Texas City, plaintiff's suit is premature, and shall be dismissed without prejudice, insofar as it seeks refunds for the past, and a new rate for the future on the claim that the 1923 rate has been put into effect in Arkansas, either voluntarily, or under final compulsion.

Appellant has appealed as to findings (1) and (2); appellee has cross-appealed as to findings (3), (4) and (5).

As the case stands before us then, only two broad questions are presented: (1) the validity and enforceability of Sec. IX; (2) its meaning, application and effect, if valid and enforceable. Appellant insists that the clause is completely invalid, because an attempt on the part of the City to surrender its non-delegable ratemaking function to appellant, and the constituted authorities in Arkansas. It argues that by its charter the Texas city is authorized and obligated to exercise its governmental function of rate regulation, and that it may not, under its general powers to contract for rates, bind itself or appellant to operate under rates which may from time to time be fixed by and in Arkansas. It insists that the ratemaking function of cities in Texas embraces and includes the power to raise, as well as to reduce rates, in the interest of and in accordance with the public need. *City of Seymour, vs. Texas Electric Service Co.*, 66 Fed. (2d) 814. *Texas & Louisiana Power Co. vs. City of Farmersville*, 67 S. W. (2d) 235. It urges that "this class of functions the City must perform. The City

has no option. They are not to be exercised or ignored by the municipality at discretion. * * * Such functions are legal duties imposed by the state upon its creature." *City of Uvalde vs. Uvalde Electric & Ice Co.*, 250 S. W. 141; *Texas Gas Utilities vs. City of Uvalde*, 77 S. W. (2d) 750. [fol. 431] It insists that this clause, which declares that "grantee shall not be authorized or permitted to charge or collect any higher rate than the lessened rate prevailing in Arkansas," and if valid, obligates the appellant and the City to maintain a particular rate, merely because it has been instituted in Arkansas, is contrary to the public policy of Texas, and void. It urges therefore, that the decree is fundamentally erroneous in adjudging the clause valid, instead of invalid, in retaining the bill to grant partial relief, instead of dismissing it altogether. In the alternative, it argues that if wrong in this, and the clause is valid and enforceable at all, it is so only prospectively to compel the fixing of rates for the future in Texas, after they have been finally fixed either compulsorily, or by agreement in Arkansas, and not retrospectively, by way of refund, for the periods when in Arkansas the rates were in dispute. It insists, therefore, that the District Judge was right in holding the clause inapplicable, and denying relief as to the 1930-34 period of controversy in Arkansas, wrong in holding it applicable and granting relief as to the December 1933-February 34 period, when, though the first litigation had ended, appellant had in October, '33 applied for and the controversy was pending, over still higher rates: that he was right in part, and wrong in part, as to the last period, from 1934 to date, right in dismissing the bill, wrong in dismissing it without prejudice. In short, appellant is here urging that the bill should have been dismissed with prejudice, both because the contract it sought to enforce is not a valid one, and because if valid, it does not apply, except prospectively, to require the Arkansas rates to be put in in Texas, after, and not before, they have been made finally effective voluntarily or by compulsion.

As to that part of the decree which sustaining the contract as valid, and awarding it reparation, was in its favor, the City insists that the clause it seeks to enforce in no manner invades or impairs its ratemaking function, in [fol. 432] no manner abdicates or delegates its governmental power to regulate the rates to be charged with in its confines.

It argues that the clause does no more than to obligate appellee, in consideration of its franchise, to serve the Texas city under rates no greater than those which from time to time, the company agrees, or the law declares, are reasonable and fair for its neighbor city in Arkansas. That in short, the clause merely operates to bind appellant not to discriminate against the Texas city by rendering substantially the same service in Arkansas, for less than it charges for it in Texas.

Agreeing with appellant that the clause would be without binding force if appellant was urging it against the City's right to regulate the rates, either upward or downward, in the exercise of its governmental power, the City argues that that principle is not applicable here, for here is no question of preventing the City from regulating appellant's rates. The question is merely whether the City may enjoy the fruits of a contract which appellant voluntarily, and for a consideration, made with it. Urging that the contract is binding upon appellant to be enforced as written, at least, until appellant shows that the application of the Arkansas city rates in the Texas city will in fact operate against the public interest, the City maintains that the limitations, if any, imposed by its ratemaking, upon its contractual, powers come into play and have effect only in situations where detriment to the public from the contract actually, not theoretically, appears. It insists; that here it is not shown that the rates are confiscatory, or otherwise against the public interest; that indeed, throughout the litigation in Arkansas the rates insisted on have been sustained; that the claim is merely that since the power to regulate cannot be contracted away, and a city cannot bind itself by contract to any fixed rate, the Utility cannot be bound to one. Citing cases which it claims hold that a Utility may be held to a [fol. 433] rate fixed in its contract, *Cleburne Water Co. vs. City of Cleburne*, 35 S. W. 733; *Texarkana Gas, etc. Co. vs. City of Texarkana*, 123 S. W. 213; *Fort Smith Light Co. vs. Fort Smith*, 202 Fed. 581; *Dallas Ry. vs. Geller*, 271 S. W. 1106; *Southern Utilities Co. vs. City of Palatka*, 268 U. S. 232; *City of Terrell vs. Terrell Elec. Co.*, 187 S. W. 966; *Pocohontas vs. Central Power & Light Co.*, 244 S. W. 712; *Texas Telephone Co. vs. City of Mart*, 226 S. W. 497, the City insists that that principle applies here to bind the Utility to decrease its rates, as it decreases them in Arkan-

sas. But see *City of San Antonio vs. San Antonio*, 255 U. S. 547; *R. R. Comm. of Calif. vs. Los Angeles Ry.*, 280 U. S. 145; *Uvalde vs. Uvalde*, *supra*.

Upon those parts of the decree which were adverse to it, the City argues vigorously that the principal apparent purpose of the parties was to keep the Texas and Arkansas rates on a parity, so that at all times the citizens of each city should pay substantially the same for the same service; that the contract should therefore be construed as applicable not merely prospectively, but retrospectively. As to the 1930-33 period, it urges that it should have had the refund just as prayed, and as to the period '34 to date, that the cause should not have been dismissed, but should have been retained until the Arkansas litigation had ended, for a decree then to be entered requiring the institution of the finally established rates for the future, and refunds for the past.

We think appellant has the right of it throughout, and that the decree should be reversed, both because the clause is completely invalid, and because, if valid and enforceable, it is without application here. But the clause is not valid. It is completely invalid and unenforceable as an attempt to abdicate and delegate the City's ratemaking function, and the decree should be reversed because it is. Whatever might be [fol. 434] said for the City's side of the case, if, as it assumes, the contract were in effect one in which the Utility had agreed, in consideration of the franchise, to maintain a fixed rate, we think it perfectly plain that the clause in question is not such a contract. Its effect is to abdicate, at least qualifiedly, the City's ratemaking function for the future, and to delegate it in the same qualified way, to the Utility and the Arkansas city.

Under it, if the Utility decides to lower its rate in Arkansas by so much as a fraction, the rates then fixed by it become the rates which may be charged in the Texas city. If the Arkansas city finally lowers its rates, ever so little or so much, those rates become the rates in Texas, no matter if those rates are deemed by the Texas city to be grossly unjust or inadequate. For this clause, unlike the clauses in the cases on which the City relies, is not one merely agreeing upon a rate which the Utility may charge. It is one purporting to bind the City and the Utility alike to abide by the future action of the Utility and the City of Arkansas, if less rates are put in there voluntarily or under final compulsion.

The clause does not provide that the grantee shall be compelled, if required by the Texas city Council, to put in the lessened Arkansas rates. It provides peremptorily and without qualification, that if the lessened rates are placed in in Arkansas, "then and thereupon the lessened rates shall apply in the city of Texarkana, Texas, and grantee shall not be authorized or permitted to charge and collect any higher rate." A more definite binding of the hands of the City Council, a more complete abdication of its ratemaking function, a more complete delegation of it could hardly be imagined. In the light of these provisions, the supposed lack of mutuality of which appellant makes so much, and the City discounts as inapplicable, disappears from the case, for here, by a specific provision that the lessened rates shall apply, and that grantee shall not be authorized to charge [fol. 435] and collect any higher rate, is an attempt to mutually bind appellant and the City of Texarkana to any lessened rates which may in future be fixed within the Arkansas city.

On the record before us the binding quality of this clause as it is conceived of by the City, is emphasized not alone by its suit for specific performance, by which it affirms the binding force as a contract of the clause it sues on, but by the undisputed fact that resting on the contract, it has entirely abdicated its ratemaking function, and has refused, upon the application of appellant that it do so, to exercise its rate regulating powers.

The decree is reversed and the cause is remanded with directions to dismiss the bill.

Reversed and Remanded.

[fol. 436]

JUDGMENT

Extract from the Minutes of June 3rd, 1938

No. 8646

ARKANSAS LOUISIANA GAS COMPANY

versus

CITY OF TEXARKANA, TEXAS

(And Reverse Title)

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to dismiss the bill;

It is further ordered, adjudged and decreed that the appellee and cross appellant, City of Texarkana, Texas, be condemned to pay the costs of this cause in this Court.

[fol. 455] ORDER DENYING REHEARING

Extract from the Minutes of July 19th, 1938

No. 8646

ARKANSAS LOUISIANA GAS COMPANY

versus

CITY OF TEXARKANA, TEXAS

(And Reverse Title)

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 456] MOTION AND ORDER STAYING MANDATE—Filed July 25th, 1938

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 8646

ARKANSAS LOUISIANA GAS COMPANY, Appellant,

vs.

CITY OF TEXARKANA, TEXAS, Appellee

(And Reverse Title)

MOTION FOR STAY OF MANDATE

The City of Texarkana, Texas, states that on June 3, 1938, a decree was entered by this court whereby the decree of the District Court was reversed and the cause was remanded to the District Court for the Eastern District of Texas with directions to dismiss the bill; that the City of Texarkana, Texas, thereafter duly filed with this court its petition for rehearing, and on July 19, 1938, an order was entered by this court denying said petition.

The City of Texarkana, Texas, states that it will file with the Supreme Court of the United States a petition for a writ of certiorari to this court but that a reasonable time, not less than thirty days, and preferably not less than sixty days, will be necessary within which to prepare and

lodge such petition and supporting brief, together with the record in the case, with the Clerk of the Supreme Court.

The City shows the court that it filed in connection with the appeal its bond in the sum of One Thousand and No/100 (\$1,000.00) Dollars conditioned that it should pay to the Arkansas Louisiana Gas Company the costs adjudged in its favor if said City should fail to sustain its appeal, that the amount of said bond is more than ample to cover any costs [fol. 457] to which said gas company may be entitled, and that the stay herein applied for affects only such judgment for costs as may be entered in favor of the gas company. The City accordingly believes that it is unnecessary for this court, in granting the stay of its mandate, to condition the same upon the giving of any further security; but in case the court should consider further security necessary the City of Texarkana, Texas, stands willing to furnish the same.

The City of Texarkana, Texas, therefore prays that an order be entered staying the issue of the mandate of this court for such time as is reasonably necessary to permit the City of Texarkana, Texas, to file with the Clerk of the Supreme Court its petition for certiorari herein with supporting brief and record.

Ed B. Levee, Jr., B. E. Carter, Solicitors for the
City of Texarkana, Texas.

[fol. 458] UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE FIFTH DISTRICT

No. 8646

ARKANSAS LOUISIANA GAS COMPANY, Appellant & Cross-
Appellee
versus

CITY OF TEXARKANA, TEXAS, Appellee & Cross-Appellant

On Consideration of the Application of the appellee & cross-appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellee & cross-appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It Is Ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final

disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition, and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 25th day of July, 1938.

(Signed) Rufus E. Foster, United States Circuit Judge.

[fol. 459]

CLERK'S CERTIFICATE

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

UNITED STATES OF AMERICA:

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 423 to 458 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 8646, wherein Arkansas Louisiana Gas Company is appellant and cross-appellee, and City of Texarkana, Texas, is appellee and cross-appellant, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 422 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 25th day of July, A. D. 1938.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

[fol. 460] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 42,779. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 294. City of Texarkana, Texas, petitioner, vs. Arkansas Louisiana Gas Company. Petition for writ of certiorari and exhibit thereto. Filed August 22, 1938. Term No. 294, O. T., 1938.

(8534)

FILE COPY

Office - Supreme Court, U. S.

FILED

AUG 22 1938

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1938

No. 294

CITY OF TEXARKANA, TEXAS.....*Petitioner*

v.

ARKANSAS LOUISIANA GAS
COMPANY*Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF AP-
PEALS FOR THE FIFTH CIRCUIT, AND
BRIEF IN SUPPORT THEREOF.

ED B. LEVEE, JR.

↓ BENJAMIN E. CARTER,
Counsel for Petitioner.

Texarkana, Texas,
August 12, 1938.

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Supreme Court of the United States

OCTOBER TERM, 1938

No. _____

CITY OF TEXARKANA, TEXAS.....*Petitioner*

v.

ARKANSAS LOUISIANA GAS
COMPANY *Respondent*

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petitioner, the City of Texarkana, Texas, respectfully shows to this Honorable Court:

A

STATEMENT OF THE MATTER INVOLVED

(1) *Preliminary Statement*

The City of Texarkana, Texas, seeks a review of a decision of the Circuit Court of Appeals for the Fifth Circuit which held to be void and unenforcible a franchise contract between that city and the local gas company, which decision, petitioner contends, is in conflict with the applicable local decisions and with the state statute.

Texarkana, Texas, and Texarkana, Arkansas, form one physical and business community, although there are two municipal corporations. The state line runs along a main street. The respondent gas company operates one distributing plant serving both cities. It operates in the Texas city under a franchise. It could not use the streets without the consent of the city. As a consideration for the grant of this franchise, respondent promised that it would give the consumers in Texas the benefit of any lower rates it might be compelled to place in effect in Arkansas. The enforceability of this promise is the principal matter involved. The suit was tried on the pleadings. The facts are not disputed.

For most of the period covered by this suit, the

company has been compelled to charge lower rates in the Arkansas city. It has refused, and now refuses, to keep its promise and to give the benefit of such lower rates to the consumers in the Texas city. The object of this suit is to compel it to do so.

The suit was begun in the state court and was removed to the Federal court, upon the order of the Federal court. The Federal District Court held (without opinion) the contract to be valid and that it applied to a part of the period in controversy. The Circuit Court of Appeals has now decided that a Texas city cannot enforce such a promise against a utility. This, the petitioner contends, is a decision of an important question of Texas law in conflict with the applicable decisions of the Supreme Court of Texas and in conflict with the city charter, which is a special act of the state legislature. That court also said, without explanation, that the promise, if binding, was not applicable here. This, petitioner contends, is an erroneous interpretation of the meaning of the contract. A review of the same will not involve this court in a study of disputed facts. Important rights of the particular consumers are involved. In view of the great cost and difficulty of rate investigations and litigation, the question whether a city and a utility can or cannot make valid agreements against rate discrimination is a question

of sufficient general importance to warrant this court in considering a case in which it arises, even though this court is, of necessity, disinclined to review on certiorari the interpretation of contracts and their application to even undisputed facts. Further, if the state law authorizes the people of a city to protect themselves by a franchise against rate discrimination and if they have done so, it is not an unwarranted use of the time of this court for this court to determine whether such people have been deprived of such protection, and forced into expensive and difficult rate litigation, through an erroneous interpretation by a Federal court of the franchise provision.

(2) *Statement of Facts.*

In 1930, respondent had pending in Texarkana, Texas, a contested application for an increase in rates. Its existing franchise was about to expire (R. 123). A compromise as to higher rates was agreed upon (R. 13 and 125), to be embodied in a new franchise. This new franchise provided, in part (R. 18):

“If Grantee shall be finally compelled to, or should voluntarily, place in any rates in the City of Texarkana, Arkansas, less than the rates granted by this Ordinance then and thereupon the lessened rate shall apply in the City of Tex-

arkana, Texas, and Grantee shall not be authorized or permitted to charge and collect any higher rate."

The franchise provided (R. 18) that it must be accepted by the company in writing, and on June 17, 1930, (R. 19) the company accepted same "with its terms and provisions."

The city charter (R. 165) provides that in the event any franchise fails to provide that all agreements therein are subject to the right and privilege of the city council to regulate rates, it shall be considered that such stipulation is nevertheless a part and parcel of the contract and franchise just as though written therein. The city charter is a special act of the legislature (R. 123).

Prior to the new franchise of 1930, gas rates in both cities were the same. An increase in Arkansas, similar to that in Texas, was obtained by agreement with the City Council. This agreement was subject to the referendum, and petitions for a referendum were filed. The Arkansas constitution provides that where such petitions are filed the measure so referred shall remain in abeyance until the election be held, but the increased rates were nevertheless put in effect in Arkansas and collected until December 1, 1933. Litigation, which the company brought to this

court (see *Southern Cities Distributing Co. v. Carter*, 285 U. S. 525), delayed the election, which was held in May, 1932. The agreement for an increase was rejected. On the day of the election, the gas company filed suit in the Federal court in Arkansas to prevent the election from having any effect, and obtained a temporary injunction. The gas company finally lost this suit. See *Texarkana v. Southern Cities Distributing Company*, 64 Fed. (2nd) 944. This court denied certiorari on October 9, 1933, and denied a rehearing on November 13, 1933. See same case under reverse title in 290 U. S. 650.

After the mandate got back, the District Court in Arkansas, on December 1, 1933, entered its final decree (R. 68), which (R. 72) ordered the gas company to restore the old (lower) rates in Arkansas, and, R. 75-78, gave judgment to the consumers in Arkansas for all amounts collected in Arkansas under the increased rates of 1930 over and above the amounts which would have been due under the old or lower rates. Refunds were made and the lower rate placed in effect as of December 1, 1933.

The company has collected the higher rates in Texas at all times since June, 1930.

The Texas city council, on Dec. 12, 1933 (R. 177), (R. 89-90) ordered the company to comply with its

franchise. The order is set out, in part, at R. 177 and at R. 361. It directed the lower Arkansas rates to be put in effect and that refunds be made to the Texas consumers similar to those made in Arkansas.

In the meantime, after this court denied certiorari and while the petition for rehearing thereon was pending, the company, on October 23, 1933, R. 365, applied in Arkansas for much higher rates. Full hearing was held and, on Dec. 22, 1933, the Arkansas city council denied the application. The company on Feb. 9, 1934 (R. 365) notified the city it would apply for an injunction against the order of December 22, 1933, refusing an increase. Such suit was filed in the Federal District Court in Arkansas on Feb. 16, 1934, and a temporary order was obtained protecting the company in charging the much higher rates it had applied for. The trial of this suit lasted until December 4, 1936, (R. 188) when the restraining order was dissolved by the District Court, the bill dismissed and judgment given the consumers for all amounts collected in excess of the old and lower rate. The judgment for refunds was superseded pending appeal, but a temporary injunction pending appeal was denied. Since December 4, 1936, the gas company has been collecting the old rate in Arkansas,—a rate much lower than the one in Texas. This de-

cree has been affirmed by the Circuit Court of Appeals for the 8th Circuit, and petition for certiorari is now pending in this court (No. 72, October Term, 1938).

The importance to the public of the decision of the Circuit Court of Appeals in this Texas case is brought out by the history of this Arkansas case. The City of Texarkana, Texas, and the gas company agreed on a simple means of avoiding discrimination as to rates. Now the lower court in this case says no such agreement can be enforced. There should be some way of avoiding such a long, dreary and expensive rate contest as the one in Arkansas, a contest that cannot be finally decided much before its fifth birthday,—one that stayed two years and ten months in the district court, and remained in the Circuit Court of Appeals until May, 1938, one year and five months after the District Court decided it.

The situation as to rates in Texarkana, Arkansas, and Texarkana, Texas, has been this:

Prior to June 17, 1930, the same rate (45c net) was collected on both sides of the state line.

From June 17, 1930, down to the present, the compromise rate (\$1.00 for the first MCF each

month and 47 $\frac{1}{2}$ c net for all above that) has been collected in Texas.

In Arkansas, the rates have been:

From June, 1930, to Dec. 1, 1933, the same compromise rate was collected as in Texas, but under the decree of December 1, 1933, refunds down to the 45c rate were made for this entire period.

On Dec. 1, 1933, the company was compelled by the final decree in the first Arkansas suit, to put the lower 45c rate in effect in Arkansas and this remained until Feb. 16, 1934, when the second Arkansas suit was filed and the temporary injunction obtained.

From Feb. 16, 1934, to Dec. 4, 1936, the company collected much higher rates in Arkansas under a temporary restraining order, which order was then dissolved and refunds then were ordered down to the old 45c rate for this entire period. These refunds was superseded, pending an appeal not yet finally disposed of.

From Dec. 4, 1936, down to the present the company has been actually collecting the 45c rate in Arkansas while it has continued to collect the higher rate in Texas.

(3) *Decision of the District Court*

This present suit, an attempt on the part of Texarkana, Texas, to enforce the non-discrimination contract of the company, has been pending since December, 1933 (R. 26). It was decided in the District Court, without opinion, on July 31, 1937 (R. 237). That court held (R. 231-237):

1. That the disputed clause of the franchise was binding and should be enforced.
2. That the lower 45c rate should have gone into effect in Texas on Dec. 1, 1933, and remained until Feb. 16, 1934, the period when it was used in Arkansas under the decree of the Arkansas District Court. Refunds to such basis were ordered for this period.
3. That the contract did not apply to the period prior to Dec. 1, 1933, and the bill was dismissed with prejudice in so far as it sought refunds in Texas for that period similar to the ones the company was compelled to make in Arkansas.
4. That the bill should be dismissed, without prejudice to a later suit after the second Arkansas case was decided, in so far as it sought any relief for the period since Feb. 16, 1934,—the date of entry of the

temporary restraining order in the second Arkansas case.

The gas company, appealed from the decree in so far as it held the contract valid and ordered refunds for the period from Dec. 1, 1933, to Feb. 16, 1934.

The city appealed from the decree denying relief for the period prior to Dec. 1, 1933. It also contended that its prayer for relief for the period since Feb. 16, 1934, should not have been dismissed with leave to file a new suit but should have been held for final disposition later.

(4) *Decision of the Circuit Court of Appeals.*

The opinion of the Circuit Court of Appeals (R. 423) was filed June 3, 1938. Petition for rehearing was duly filed and was denied on July 19, 1938, (R. 455).

That court decided that the franchise clause was completely invalid, and that, if valid, it was without application here.

No explanation was made as to why the clause, if valid, was without application, at least to the period from Dec. 1, 1933, to Feb. 16, 1934, when the gas company, under a direct and explicit order of a Federal District Court, was compelled to charge a lower rate in Arkansas.

The decision that the clause was completely invalid rests as petitioner understands, upon the following theories:

1. A Texas city, whose city council is endowed with the power to regulate rates, cannot by contract bind its city council not to exercise those powers. This is undisputed.

2. The franchise provision that if lower rates be put into effect in Arkansas they shall apply in Texas and that the company shall not charge higher rates in Texas than in Arkansas, amounts to an attempt to bind the hands of the city council not to raise the rates above the Arkansas rates and is a complete abdication of its ratemaking function. This, the petitioner contends is error for several reasons:

A. It is a most unnatural and strained construction of the clause,—one which the petitioner would have regarded as impossible but for the opinion below, and one not advocated by the respondent, whose argument was that the clause was void for want of mutuality because the city could not and did not make it a counter promise about rates.

B. The decision is in conflict with the only applicable decision of the Supreme Court of Texas.

C. The decision, in so construing the clause, dis-

regards the City Charter (a special statute of the state legislature), which provides that the reserved privilege of the city council to regulate rates must be considered to be a part of every agreement between the city and a utility.

(5) *Other Facts.*

There are other facts set forth in the pleadings which petitioner does not regard as material and which were not relied upon by the court below in its decision, but which are here summarized because relied upon by the respondent in the lower court.

On November 4, 1933, R. 171, the gas company applied to the Texas City Council for an increase in rates, similar to that applied for in Arkansas. The Council passed a resolution for a hearing, without waiving the city's franchise rights but to determine whether the company should be relieved from its promise. After a full hearing the Council, on Jan. 23, 1934, (R. 181) made an order finding that the 45c rate then in effect in Arkansas was sufficient to pay all expenses, depreciation and return in Texas, and refusing to grant any relief from the contract or to increase rates and ordering the City Attorney to continue his efforts to force the company to comply with its promise and place the 45c Arkansas rate in effect in Texas.

The company, on March 3, 1934, appealed (R. 183) to the Texas Railroad Commission from this order of Jan. 23, 1934, and from the order of Dec. 12, 1933, which had first called upon it to place the lower Arkansas rate in effect. The Commission required the company to file a \$10,000.00 bond, which the company refused to file. The matter went no further.

The company in its pleadings in this case in the District Court, besides attacking the validity of the franchise clause against discrimination, pleaded that any rate lower than the rate asked for by it on November 4, 1933, was confiscatory. The city moved to strike the answer. This was the record on which the District Court decided the case. The motion to strike was granted and, the gas company not desiring to plead further, the District Court entered its decree as above stated (R. 233).

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals, in interpreting the non-discrimination clause of the franchise as an attempt to bind the city council not to exercise its rate making powers, refused to obey the plain man-

date of the statute and so placed on the franchise an interpretation which it cannot bear under the state law, which erroneous interpretation is given by that court as its reason for holding the clause invalid.

The city charter, an act of the State Legislature, provides (R. 165) that every franchise must set forth that the council shall have the right to regulate rates, and that, if such stipulation be omitted it shall be considered to be part and parcel of the franchise just as though written therein. Under this statute the clause in question must be interpreted to read that the company will give the Texas city the benefit of any lower rate it may be compelled to use in Arkansas, "provided this agreement is subject to the right and privilege of the city council to regulate and fix the rates." Under the statute, the clause in question cannot bear the interpretation, placed on it by the Circuit Court of Appeals, that it is an attempt to bind the council not to raise the rates above the Arkansas level even though the council might find the Arkansas rates to be too low.

The construction of the franchise adopted by the lower court is a strained, unnatural and erroneous construction. The respondent argued below that the clause was void, as a matter of contract law, because

the city could not, and had not attempted to, make to the company any counter promise as to rates.

2. The Circuit Court of Appeals, in deciding that the non-discrimination clause of the franchise was invalid, decided an important question of local law in a way probably in conflict with the applicable local decisions.

In *Dallas Railway Company v. Geller*, 271 S. W. 1106 (1925) the Supreme Court of Texas, in discussing the validity of a franchise agreement for a maximum fare, between a street railway and a Texas city, which city was endowed with the power to regulate rates, said:

"The right or power to further control and regulate the grant in regard to the rate schedule is a reservation to the municipality, *and not an inhibition to contract*; and, where a franchise is accepted by a grantee, this reservation provided in the law becomes a part of the contract."

This is an essentially similar case, and the Circuit Court of Appeals has here held that the fact that the city council does have the power to regulate rates is an inhibition to contract, and that the reservation provided in the law does not become a part of the contract against discrimination and hence that the

contract is void because, as erroneously construed by that court, it is an attempt to bind the city council not to exercise its rate making powers.

3. The Circuit Court of Appeals, in deciding that a city cannot, by a franchise or contract provision, bind a utility not to discriminate against its local consumers, has decided an important question of general law in a way probably untenable and probably in conflict with the weight of authority.

A few cases are discussed in the brief. In the *Los Angeles Street Railway Case*, 280 U. S. 145, Mr. Justice Brandeis said, 280 U. S. 162, that the theory that a utility could not be bound by an agreement as to rates because the city could not bind itself on the same matter was a conclusion which, "is not commanded by logic or by the law of contracts." In the same case Mr. Justice Stone said, 280 U. S. 167, that no principle of the law of contracts, *qua* contracts, would preclude a railway company from binding itself to a definite rate even though the city could not similarly bind itself.

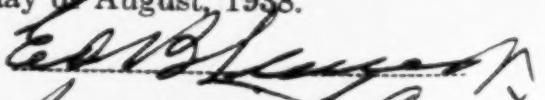
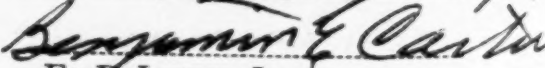
4. The importance of the questions involved justify this court in considering whether the Circuit Court of Appeals erred in determining that the non-discrimination clause of the franchise if valid, is not

applicable to the facts of this case. The Circuit Court of Appeals erred in holding that the clause was not applicable to any of the period covered by this suit, and the District Court erred in holding that it was not applicable to the period prior to December 1, 1933. Pctitioner is entitled to a decree giving to its consumers relief for the entire period prior to Feb. 16, 1934, and permitting it to sue for relief for the period after that date when the pending Arkansas case is settled.

PRAYER.

WHEREFORE, the City of Texarkana, Texas, prays that a writ of certiorari be granted herein to the United States Circuit Court of Appeals for the Fifth Circuit, in cause No. 8646 on its docket, entitled *Arkansas Louisiana Gas Company v. City of Texarkana, Texas*, (And Reverse Title); that said cause be here reviewed and determined; and that the judgment of said court herein be reversed, the judgment of the district court corrected as above set forth, and for such further relief as may be found proper.

This the twelfth day of August, 1938.

ED B. LEVEE, JR.
BENJAMIN E. CARTER,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

THE OPINIONS OF THE COURT BELOW

The district court did not file an opinion. The opinion of the Circuit Court of Appeals, appearing at R. 423, has not been officially reported when this brief is written. It is reported in 97 Federal, 2nd, at page 5 (advance opinions).

II.

JURISDICTION.

(1) The statutory provision which is believed to sustain the jurisdiction of this court is Section 240 of the Judicial Code, including the amendments thereof, Title 28, U. S. Code, Sec. 347.

(2) The decree of the Circuit Court of Appeals was entered on June 3, 1938 (R. 433). The petition for a rehearing was denied by that court on July 19, 1938 (R. 455). The petition for certiorari is to be filed on or about August 24, 1938.

(3) The nature of the case has been stated in the foregoing petition. The case resulted in a final judgment and decree in the Circuit Court of Appeals which appears in the record at page 433.

(4) Under the statutory provisions above referred to this court has jurisdiction to review on certiorari the final judgment of the Circuit Court of Appeals in any case and it is not believed to be necessary to cite any cases to sustain the jurisdiction of this court.

III.

STATEMENT OF THE CASE.

The case has already been stated in full in the preceding petition under heading "A" and the statement therein set forth is hereby adopted and made a part of this brief and in the interest of brevity, is not here repeated.

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in finding and holding that the disputed non-discrimination clause is invalid.

2. The Circuit Court of Appeals erred in holding that said clause, if valid, is without application to the facts of this case, and the District Court erred in refusing to apply it to the period prior to December 1, 1933.

3. Petitioner also adopts, as errors to be urged, the reasons set forth under "B" in its petition for the allowance of the writ.

V.

ARGUMENT.

SUMMARY OF ARGUMENT.

A. The Circuit Court of Appeals in interpreting the non-discrimination clause of the franchise as an attempt to bind the City Council not to exercise its rate making powers, refused to obey the plain mandate of the statute and so placed on the franchise an interpretation which it cannot hear under the state law,—which erroneous interpretation is given by that Court as its reason for holding the clause invalid.

B. The Circuit Court of Appeals, in deciding that the non-discrimination clause of the franchise was invalid, decided an important question of local law in a way probably in conflict with the applicable local decisions.

C. The Circuit Court of Appeals in deciding that a city cannot, by a franchise or contract provision, bind a utility not to discriminate against its local consumers, has decided an important question of general law in a way probably untenable and in conflict with the weight of authority.

D. The importance of the questions involved justify this court in considering whether the Circuit Court of Appeals erred in determining that the non-intervention clause of the franchise, if valid, is not applicable to the facts of this case, and in determining whether it is applicable to the entire period prior to Feb. 16, 1934.

ARGUMENT.

A.

The Circuit Court of Appeals, in interpreting the non-discrimination clause of the franchise as an attempt to bind the City Council not to exercise its rate making powers, refused to obey the plain mandate of the statute and so placed on the franchise an interpretation which it cannot bear under the state law,—which erroneous interpretation is given by that Court as its reason for holding the clause invalid.

The clause in question reads as follows (R. 18):

“If grantee shall be finally compelled to, or should voluntarily, place in any rates in the City of Texarkana, Arkansas, less than the rates granted by this ordinance, then and thereupon the lessened rate shall apply in the City of Texarkana, Texas, and grantee shall not be author-

ized or permitted to charge and collect any higher rate."

The franchise was agreed to by the company (R. 19).

The petitioner contends that the legislature of Texas has commanded that this clause be interpreted with the following proviso (not quoted from the statute), or one of similar import, as a part and parcel thereof:

"*** provided, the council shall have the right and privilege of fixing and regulating rates from time to time as authorized and commanded by the City Charter."

The City Charter is a special act of the legislature (R. 123). It provides in Section 196 (R. 166) that the city council shall have the power to regulate rates. Section 163 (R. 165) commands that every franchise "must expressly set forth that the council shall have the right and privilege of ***** fixing fares, rates, tolls and charges *****". Section 163a (R. 165) provides that in the event the franchise shall not contain such a provision "**** it shall, nevertheless, be considered that all the said stipulations contained in said Sections *** 163 *** are part and parcel of the said contract and franchise, just as though writ-

ten therein, and the said applicant so accepting such franchise **** shall be held and firmly bound thereto, notwithstanding such ommissions."

The Circuit Court of Appeals has refused to follow such legislative command. It has said that the clause is void because the clause is an attempt to bind the city council not to exercise its rate regulating powers. Aside from the statute, this is an erroneous interpretation of the franchise. In view of the statute, such a meaning cannot be placed upon the franchise without a plain violation of the statute.

When a lower Federal court refuses to apply a state statute, it is a proper function of this court to grant certiorari to correct such an error.

If the Charter command be heeded, the franchise cannot bear the interpretation made by the lower court. This intepretation is the sole assigned reason for the decision below that the clause is invalid.

B.

The Circuit Court of Appeals, in deciding that the non-discrimination clause of the franchise was invalid, decided an important question of local law in a way probably in conflict with the applicable local decisions.

An almost exactly similar question was discussed

by the Supreme Court of Texas in the case of *Dallas Street Railway Co. v. Geller*, 271 S. W. 1106 (1925), reported below in 245 S. W. 254 (Court of Civil Appeals at Dallas). The opinion in the Supreme Court is by that court itself,—not by one of its Commissions of Appeal. The opinions do not show exactly how the issues got before the court, and for that reason petitioner has consulted the briefs in the case.

In 1917, the City of Dallas, Texas, granted a franchise to the street railway, which was accepted by it, which contained an agreement for a maximum fare of five cents. That city operates under a charter which vested in the board of commissioners the power to regulate rates. In 1922, the railway asked for an increase in rates and the Commissioners granted an increase for a period of one year. The briefs show that the commissioners, in granting the increase, specifically saved the contract rights of the city to a maximum fare of five cents and provided that the increase was temporary, to meet an emergency, and that at the end of the year the company should return to the five cent fare.

Thereafter one Geller, a citizen, taxpayer and customer of the street railway, brought suit against it to enjoin the increase. The city was not made a party. He claimed that the franchise was a contract

and that the company was violating the contract in charging more than five cents because the action of the commissioners in granting an increase was subject to the referendum and such action had been taken in such a way as to prevent a referendum. The city seems not to have been in the case until after the Court of Civil Appeals acted upon it.

The trial court simply dismissed Geller's suit, and he appealed to the Court of Civil Appeals. The Court held that the franchise was not a contract, that a city whose council had the power to regulate rates could not bind a utility as to rates by a contract, but that the grant of the increase was subject to the referendum and that one should be held.

The street railway appealed to the state Supreme Court. It expressed itself as satisfied with the holding that it could not be bound by an agreement as to rates, but it sought reversal of the holding as to the referendum.

At this stage the City Attorney of Dallas filed a brief as *amicus curiae* seeking to protect the contract rights of the city to the five cent fare. He was joined by the city attorneys of a number of other Texas cities. They all asked the Supreme Court to reverse the holding that a city endowed with the power to regulate rates could not make a contract as to rates

which would bind a utility even though the city did not try to bind its council or board not to exercise the rate making power given it by statute.

While the case was pending, one of the Commissions of Appeals of the Supreme Court decided the case of *Uvalde v. Uvalde Elec. & Ice Co.*, 250 S. W. 140. In that case the city had obtained a promise as to rates from the utility by giving in return therefor its express promise that such rates would be maintained for a number of years. The city council had the power to regulate rates and the Commission of Appeals held the contract void. It also argued that a utility could not be bound by such a contract with a city whose council had such powers, even though the city did not attempt to bind its city council,—in other words that such a city could not buy such a promise from a utility for any consideration.

At that time the Supreme Court of Texas had the custom, in many cases, of adopting the recommendation of its commissions of appeals as to the judgment to be entered without approving the reasoning by which the commission reached its conclusion. The opinion was not regarded as a precedent unless expressly approved by the Supreme Court, and the questions discussed were regarded as open questions. An example of the formula used to approve an opin-

ion written by a commission is found at the end of the case of *Pullman Co. v. Hayes*, 271 S. W. 1108 at 1110. Another example is at the end of the case which follows the Uvalde case in 250 S. W. (see p. 148). In the Uvalde case, the Supreme Court did not approve the opinion but adopted the judgment recommended by its commission.

As stated, the opinion of the Commission in the Uvalde case came out while the Geller case was pending in the Supreme Court and briefs were filed arguing the effect of that case.

Such was the situation before the Supreme Court of Texas when it wrote its opinion in the Geller case. The utility had promised a certain maximum fare. The city had made no counter promise as to rates. The Court of Civil Appeals in that case had held that such a contract could not bind the utility, and this point had been briefed by various city attorneys as *amici curiae* and the court had been confronted with the unapproved opinion of its commission in the Uvalde case. In these circumstances, the Supreme Court of Texas said, 271 S. W. 1106:

“Perhaps the city attorneys, *amicus curiae*, are unduly or unnecessarily alarmed, construing, as they do, the opinion of the honorable Court of Civil Appeals to hold that a municipality cannot

make contracts that are binding upon public service corporations."

The Supreme Court then discussed various cases cited by the lower court to the effect that the legislative power to regulate rates was limited by the due process clause, and that this power could not be bartered away. The court then said (271 S. W. 1107):

"The right or power to further control or regulate the grant (of a franchise) in regard to the rate schedule is a reservation to the municipality and not an inhibition to contract; and, where a franchise is accepted by a grantee, this reservation provided in the law becomes a part of the contract."

The Supreme Court went on to hold that the grant of the increase was an exercise of the regulatory powers granted by the charter and that the lower court was in further error in holding it was subject to a referendum, and reversed the judgment.

Petitioner believes that this opinion of the Supreme Court of Texas establishes the law in Texas to be that the existence of the powers of the city council to regulate rates is "not an inhibition to contract," but is a "reservation to the municipality," and that the Circuit Court of Appeals has in this case held "that

a municipality cannot make contracts that are binding upon public service corporations," and in so doing it has decided an important question of local law in a way probably in conflict with the applicable local decisions and probably in conflict with the way the state courts would have decided this case,—a case begun in the state courts and removed under the authority of the Federal statutes to the Federal courts. The Circuit Court of Appeals has certainly refused, in the face of the charter and of this decision, to treat the existence of the regulatory power as a reservation in the contract, and has treated such power as an inhibition to contract when the Supreme Court of Texas has said it is not. The question whether a Texas city can make a contract as to rates which will bind a utility is certainly an important question of local law. It is squarely presented in this case. The Supreme Court of Texas has clearly stated its opinion to be just the opposite of the conclusion reached by the Circuit Court of Appeals in this case. Petitioner urges that the case is one in which both the Federal statute and the rules of this court contemplate that certiorari should be granted.

C.

The Circuit Court of Appeals in deciding that a city cannot, by a franchise or contract provision,

bind a utility not to discriminate against its local consumers, has decided an important question of general law in a way probably untenable and in conflict with the weight of authority.

Petitioner does not know whether, after the decisions of this court in *Erie Railway Co. v. Tompkins*, April 25, 1938, (82 L. ed., Adv. Op. 787) and *Ruhlin v. New York Life Ins. Co.*, May 2, 1938, (82 L. ed. Adv. Op. 823), there can be an important question of "general" law as distinguished from the applicable local law, but petitioner desires to remind this court of a few of its own decisions which indicate strongly that a utility may be bound by a franchise agreement as to rates even though the city cannot bind itself to maintain the same rates.

In *Henderson Water Co. v. Commission*, 260 U. S. 278, the utility was held bound by a contract as to rates until it might be relieved therefrom by the rate making body,—in that case a state commission. Here the rate making body is the city council,—not the city, but the officers who are members of its council. That rate making body, after full hearing and extensive investigation, has refused to relieve the utility of its agreement.

In *Southern Utilities Co. v. Palatka*, 268 U. S. 232, this court held that the fact that the legislature,

or a state commission, might regulate rates notwithstanding a rate contract did not destroy the binding effect of the contract between the parties when it is left undisturbed, and this court left open the question whether such a contract might not bind the utility even if it left the city free.

Petitioner has already, in the petition, quoted the remarks of Justices Brandeis and Stone in the *Los Angeles Street Ry. Case*, to the effect that the utility may be bound as to rates even though the city cannot make it a counter-promise on the same subject matter. Justice Butler, speaking for the majority in that case, at 280 U. S. 152, held that the question whether the city could make such a contract was a matter of state law, and decided the issue in that case as such a matter. Under heading "2" of the court's division of its opinion (280 U. S. 156), it proceeded on the assumption that there was such a contract and held that, if there was, it had been abrogated.

The case of *Knoxville v. Knoxville Water Co.*, 189 U. S. 434, presented a case where a city did have rate making powers and did not undertake to waive any of its rate making powers, but the utility did bind itself to a maximum rate. This court said (189 U. S. 436-437) :

"People who have accepted, as experience shows that people will accept, a charter subject to such liabilities, cannot complain of them or repudiate them, nor can the company which they have formed."

The Knoxville case is also in point in connection with the manner in which the lower court in this case interpreted the contract. There was not there, and there is not here, any express attempt to bind the city. The company was notified by statute of the rate making power of the city, just as here it was notified by statute of the powers of the city council. In the Knoxville case, this court said (189 U. S. 437):

"In the present case it seems to us impossible to suppose that any power to contract which the City may have had was intended to be exercised in such a way as to displace the municipal power expressly reserved or given by the general law."

D.

The importance of the questions involved justify this court in considering whether the Circuit Court of Appeals erred in determining that the non-intervention clause of the franchise, if valid, is not applicable to the facts of this case.

Petitioner believes that if this court should conclude that the city and the consumers therein do have a valid contract, the importance of the questions involved justify this court in taking sufficient time to see whether the contract is applicable to the situation here. The judgment of the Circuit Court of Appeals now stands as an adjudication that a Texas city with rate regulating powers cannot bind a utility as to rates. This court knows that most utilities manage to be foreign corporations and, with this decision of the Circuit Court of Appeals as a precedent, that every case involving such a contract in Texas will wind up in the Federal Court. The Supreme Court of Texas has in the Dallas Case, hereinbefore discussed, indicated that a city may bind a utility as to rates by a franchise agreement. The Dallas Case also indicates that there probably are numerous franchise agreements which may involve this question.

An investigation by this court as to whether the contract, if valid, applies to the facts here involved will not engage this court in a study of disputed facts. The facts are simple and have been heretofore stated. The question is one as to the meaning of the discrimination clause in the franchise. The Circuit Court of Appeals did not indicate why it thought the clause was not applicable, but the argument

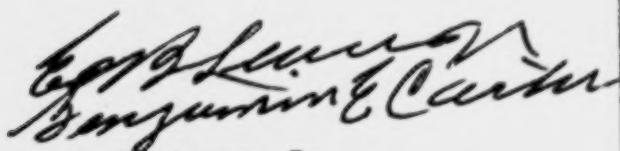
which was presented to it by the gas company was to the effect that, even though it was compelled to lower its rates in Arkansas by a decree of a District Court of the United States, it was not finally compelled to lower them because at the time this decree was rendered it had pending in Arkansas an application for an increase in rates. As petitioner understands it, the contention is that the clause will never be applicable in any case where, after an appellate court has acted and before its mandate can be obtained so that the lower court may enter a final decree, the company has again applied for an increase in Arkansas. As this is written, there is now pending in this court an attempt on the part of this same company to set aside another decree of the Federal Court in Arkansas which in substance compels it to use a lower rate in Arkansas than in Texas. If this court should refuse certiorari in that case and if the gas company should start a new rate proceeding in the rate tribunal in Arkansas before the mandate could be obtained, then the contention would be that the gas company has not yet been finally compelled to use lower rates in Arkansas. This is the only basis petitioner knows of upon which it could be contended that the non-discrimination clause in the Texas franchise is not applicable to at least a part of the time covered by this suit, and it is petitioner's contention that the Circuit

Court of Appeals erred in deciding, without any discussion, that the clause, if valid, does not apply to the facts of this case.

Petitioner further contends that any such application of the franchise is erroneous and that it was the intention of the parties in making this agreement that, whenever it was finally decided that Arkansas was entitled to a lower rate, Texas should obtain the benefit of this lower rate in the same manner that Arkansas obtained the benefit of it, and if this court decides to grant certiorari petitioner respectfully asks that the case be brought up in such a manner that it may present its contentions that the consumers in Texas are entitled to the same benefit from the lower rates that the Arkansas consumers receive or may receive for the entire period. Whether or not, however, this court feels that it can take the time necessary to grant complete relief, it is petitioner's earnest contention that the decision of the Circuit Court of Appeals that the clause is not applicable is manifestly and plainly in error for a period of at least two and a half months of the time covered by this suit, and that as to this period at least the importance of the question involved urge that this court should grant certiorari.

CONCLUSION.

It is, therefore, respectfully submitted that a writ of certiorari should be granted, that the decision below should be reviewed and reversed, and that the city be granted such relief as is necessary to give them for the entire period covered by the suit the same benefits from lower rates as the Arkansas consumers have enjoyed.

A handwritten signature in dark ink, appearing to read "Benjamin E. Carter". The signature is written in a cursive, flowing style with some loops and flourishes.

ED B. LEVEE, JR.

BENJAMIN E. CARTER,
Counsel for Petitioner.

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938.

No. 294.

CITY OF TEXARKANA, TEXAS.....*Petitioner*

v.

ARKANSAS LOUISIANA GAS COMPANY.....*Respondent*

On Writ of Certiorari to the United States
Circuit Court of Appeals
For Fifth Circuit.

BRIEF FOR THE PETITIONER.

ED B. LEVEE, JR.,
✓ BENJAMIN E. CARTER,
Counsel for Petitioner.

TEXARKANA, TEXAS,
NOVEMBER 5, 1938.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938.

No. 294.

CITY OF TEXARKANA, TEXAS.....*Petitioner*

v.

ARKANSAS LOUISIANA GAS COMPANY.....*Respondent*

BRIEF FOR PETITIONER.

May It Please the Court:

This case is before the court on writ of certiorari, granted on October 10, 1938, to the Circuit Court of Appeals for the Fifth Circuit.

I.

THE OPINIONS OF THE COURTS BELOW.

The trial court, the United States District Court for the Eastern District of Texas, filed no opinion. Its decree, R. 231-237. contains its findings.

The opinion of the United States Circuit Court of Appeals is reported in 97 Federal (2nd) 5. It appears in the record at R. 423.

II.

JURISDICTION.

A writ of certiorari has been granted herein to a final judgment and decree of the United States Circuit Court of Appeals for the Fifth Circuit. This decree was entered on June 3rd, 1938, (R. 433). A petition for rehearing was filed in that court on June 22, 1938, (R. 435), and was overruled on July 19, 1938. R. 445. The petition for a writ of certiorari and the transcript of the record were filed in this court on August 22, 1938.

Section 240 of the Judicial Code, as amended, Title 28 U. S. Code, Section 347, confers jurisdiction on this court to review on certiorari the final judgment of a Circuit Court of Appeals in any case, with the same power and authority, and with like effect, as if the cause had been brought here by unrestricted writ of error or appeal.

The nature of the case was set forth in the petition for writ of certiorari and is set forth below in the Statement of the Case. It is not believed that it is necessary to repeat it here.

III.

STATEMENT OF THE CASE.

Note. References to the record herein are to the

numbers of the printed pages of the transcript as certified to this court. This record is now being reprinted by the clerk of this court and the page numbers of this reprint are not available when this is written.

A. Preliminary Statement.

The petitioner, the City of Texarkana, Texas, here seeks to enforce against the respondent, the Arkansas Louisiana Gas Company, a clause in the franchise contract between the parties, under which the company operates the gas distributing system in the city. The parties are hereafter referred to as the "city" and as the "gas company."

The clause of the contract here involved reads as follows, R. 18:

"Section IX. If grantee shall be finally compelled to, or should voluntarily, place in any rates in the City of Texarkana, Arkansas, less than the rates granted by this Ordinance then and thereupon the lessened rate shall apply in the City of Texarkana, Texas, and grantee shall not be authorized or permitted to charge and collect any higher rate."

The District Court held this section to be valid and applied it to a part of the period covered by the suit.

The Circuit Court of Appeals held it to be invalid, and that, if valid, it was not applicable at all.

Texarkana, Texas, and Texarkana, Arkansas, form one physical and business community, although there are two municipal corporations divided by the state line along the middle of a main street. The gas company has one gas distributing plant which serves both cities.

For the entire period covered by this suit, from June, 1930, to date, the company has been compelled to extend to its consumers in Texarkana, Arkansas, services at rates less than the rates granted in the Texas franchise and collected by the company from Texas consumers. The city contends, for itself and for its consumers, that the above franchise section should be enforced by compelling the gas company to place such lesser rate in effect in Texas, and to refund to its Texas consumers the excess collected above the lesser rate.

The District Court for the Eastern District of Texas held the clause valid, but that it applied to a part only of the period covered by the suit. R. 231-237. No opinion was filed.

The Circuit Court of Appeals for the Fifth Circuit held (R. 423-432) the clause to be invalid, and that, if it were valid and enforceable, it is without applica-

tion in this suit. The second holding was not discussed or explained. (R. 431).

The holding that the clause is invalid was based on the court's interpretation of the clause to mean that the city was attempting to bind its City Council not to exercise its powers as a rate regulating tribunal,—an interpretation which the city contends is (1) forbidden by an applicable state statute, (2) in conflict with applicable state court decisions, and (3) a forced, unnatural and erroneous interpretation of plain words.

The city, in its petition for writ of certiorari, asked this court to review the holding of the District Court that the clause applied to a part only of the period covered by the case, and the holding of the Circuit Court of Appeals that it was invalid and was without application at all. The facts are not disputed. Nearly every reference in this brief is to a pleading of the gas company.

B. Description of the Contract Sued Upon.

The gas company operates in Texarkana, Texas, under a franchise contract with the city. It could not use the streets without the consent of the city. The giving of such consent is the grant of a privilege which the Texas courts have repeatedly held (cases cited in argument below) to be a valuable con-

sideration sufficient to bind promises, including promises as to rates, made by a utility in return therefor.

The name of the respondent has been changed during the pendency of the suit from Southern Cities Distributing Company to Arkansas Louisiana Gas Company. In 1928, it purchased from the Southwestern Gas & Electric Company (R. 123) the gas plant and franchise in Texarkana, Texas,—a franchise which was due to expire by its own terms in 1930 (R. 123). The franchise which the respondent so purchased contained the following clause (R. 67):

“Article E: It is further understood between the said Southwestern Gas & Electric Company, its successors and assigns, and the City of Texarkana, Texas, that said Southwestern Gas & Electric Company shall not at any time charge for furnishing gas either to domestic or industrial consumers in the City of Texarkana, Texas, a greater sum or charge than it at the same time charges and collects from like consumers for similar service in the City of Texarkana, Arkansas.”

Early in 1930, as the franchise was about to expire, the company applied for an increase in rates, which was refused by the City Council. This dis-

pute was settled by a compromise, and as a part thereof a new 25 year franchise contract was agreed upon. The new and increased rates were embodied in the franchise (R. 13), being therein described as rates "*determined and fixed by compromise agreement.*" This new franchise contained the agreement, (the Section IX copied in part "A" of this statement), designed to protect the city and its consumers against discrimination just as Article E of the expiring franchise had done.

This franchise, so conditioned, was granted by an ordinance passed by the City on June 13, 1930 (R. 18), and which provided that it become effective upon the gas company "filing a written acceptance of the terms" thereof. The gas company did file, on June 18, 1930, its written acceptance of the ordinance "with its terms and provisions." (R. 19).

This franchise has not been amended, repealed or modified (R. 127).

C. Facts as to Violation of the Contract.

Only domestic and commercial rates are involved in this controversy.

Texas Rates.

Since June 13, 1930, the gas company has charged and collected in Texarkana, Texas, the increased

rates which were placed in effect by the compromise agreement, of which Section IX was a part. It so states on page 3 of the brief it filed in opposition to the petition for writ of certiorari herein. These rates are shown on R. 13 and 14, and, for domestic and commercial consumers, have been, and now are:

For the first 1,000 cubic feet per month per consumer, \$1.00. This is also the minimum charge.

For the next 149,000 cubic feet per month per consumer, at the rate of \$0.50 per thousand cubic feet with a discount for prompt payment of 5%,—a net charge of 47½c per MCF.

For all over 150,000 cubic feet per month per consumer at the rate of 25c per MCF, with a discount of 2c per MCF for prompt payment,—a net rate of 23c per MCF.

For convenience, this rate schedule is hereinafter referred to as the \$1.00 rate.

Arkansas Rates.

(1) Summary of Facts.

The facts as to the Arkansas rates for this entire period are detailed below. Briefly stated, the fact is that for this entire period, the company has been finally compelled to supply gas in Texarkana, Arkan-

sas, at the following rates for domestic and commercial consumers (R. 73):

For the first 100,000 cubic feet at the rate of 50c per thousand, with a ten per cent discount for prompt payment. The minimum charge is 50c per month. This is a net rate of 45c per MCF.

For all over 100,000 cubic feet per month at the rate of 22c per MCF with a discount of 10% for prompt payment,—a net rate of 19.8c per MCF.

For convenience, this rate schedule is hereinafter referred to as the 45c rate.

In an answer filed on July 14, 1937 (R. 225) the gas company stated (R. 148) that its estimate of the amount collected in Texas up to that time in excess of the amount due if the Arkansas rates were applicable was that the excess was probably more than \$150,000.00.

(2) Details as to Facts on Arkansas Rates.

Prior to the new franchise of 1930, the rates in Arkansas and Texas were the same, being the rates set forth above as the Arkansas rates. For Texas, they are set forth at R. 65 to 67. For Arkansas, they are set forth at R. 222 to 224. The company has pointed out one difference in that the Arkansas rate, at R. 224, contains a \$1.00 charge for turning

gas on after a customer has been cut off for non-payment of bills or where his meter has to be moved more than once in 12 months, which charge did not exist in Texas.

An attempt to increase the Arkansas rate, to the same rate as that obtained in Texas on June 13, 1930, was made at the same time. A similar compromise agreement was made with the Arkansas City Council. This Arkansas agreement was, however, subject to the referendum, and referendum petitions were filed against it. The Arkansas constitution provides that all measures referred to the people shall remain in abeyance until the election be held. The increased rates were, nevertheless, put into immediate effect in Arkansas and the council refused to call a referendum election. A mandamus action was filed to compel it to do so. The gas company intervened in this suit and carried it to the Supreme Court of Arkansas, where a judgment ordering the election was affirmed, (*Southern Cities Distributing Co. v. Carter*, 184 Ark. 4), and then to this court, where the company's appeal was dismissed and certiorari denied on March 14, 1932. See same case in 285 U. S. 525. The referendum election was then held in May, 1932, resulting in the rejection of the compromise agreement as to rates. On the day of the election, the gas company filed suit in the Uni-

ted States District Court in Arkansas to prevent the election from having any effect and to protect the company in its past action in charging the higher rate and in its proposed future action of continuing to charge it in spite of the election. It obtained a temporary injunction and continued to charge the increased rate thereunder. The Arkansas city appealed from a refusal to dissolve the injunction and the Circuit Court of Appeals for the Eighth Circuit reversed the case and dismissed the bill. See *Texarkana v. Southern Cities Distributing Company*, 64 Fed. (2nd) 944. This court, in that case, denied certiorari on October 9, 1933, and denied a rehearing thereon on November 13, 1933. See same case, under reverse title in 290 U. S. 650.

In this last case, the District Court in Arkansas entered its final decree on December 1, 1933. This appears at R. 68, and following. This decree (R. 72) compelled the company to restore the old rate of 45c net for domestic and commercial consumers in Arkansas, and, further, to make refunds to all the Arkansas consumers down to the basis of this rate for all amounts collected under the compromise increased rates of 1930 over the amount that would have been due under the old and lesser rate of 45c net per MC₁ which was in effect when the compromise agreement was made. Such refunds were made,

in the amount of about \$66,000, and the lesser rate was placed in effect as of December 1, 1933.

For this first period then, from June, 1930, to December 1, 1933, the company was compelled to place a rate of 45c net in effect in Arkansas while it collected the higher compromise rate of 1930 in Texas. The city, in the suit now at bar, sought refunds for the Texas consumers for this period. The District Court in this case held the contract was not applicable to this period and dismissed the bill as to it (R. 234). The city assigned this as error (R. 414) on its appeal to the Circuit Court of Appeals, and asks this court to review it.

For the period from December 1, 1933, to February 16, 1934, the company collected the lesser rate of 45c net in Arkansas. It continued to collect the \$1.00 rate in Texas. The District Court held the non-discrimination clause of the franchise to be valid and to be applicable to this period. The company appealed from this, and the Circuit Court of Appeals held the clause to be invalid, and without application if it were valid.

On October 23, 1933, R. 365, after this court denied certiorari in the injunction case from the Federal Court in Arkansas, and while a petition for a rehearing thereon was pending here, the company filed

with the Arkansas City Council an application for rates much higher than the old 45c net rate, and much higher than the compromise rate of 1930. Full hearings were held and on December 22, 1933, the application was denied, and the company was ordered to continue the 45c rate. On February 9, 1934, R. 365, the company gave notice of an application for a temporary injunction to protect it in charging the increased rates. Suit was filed in the Federal Court in Arkansas on February 16, 1934, and a temporary restraining order then obtained which protected the company until Dec. 4, 1936, in collecting in Arkansas a much higher rate than the \$1.00 rate it was then charging in Texas. This suit resulted in a decree in the District Court in Arkansas on December 4, 1936 (R. 188), dissolving the injunction, restoring again the old 45c net rate, and ordering refunds down to such rate for the period from Feb. 16, 1934, to December 4, 1936. This judgment for refunds was superseded pending the appeal. A temporary injunction pending the appeal was denied (R. 119) and the rate charged and collected in Arkansas since Dec. 4, 1936, has been 45c net per MCF,—much lower than the Texas rate. The Circuit Court of Appeals for the Eighth Circuit affirmed the decree of December 4, 1936. See *Arkansas Louisiana Gas Company v. City of Texarkana*,

Ark., 96 Fed. (2nd) 179, and this court denied certiorari therein on October 10, 1938.

Thus for the entire period from February 16, 1934, to date, the company has been compelled to serve at a lower rate in Arkansas than in Texas. For the first part of this period, from February 16, 1934, to December 4, 1936, a higher rate was collected, under the temporary injunction, in Arkansas than in Texas, but there is a final judgment for refunds for this period down to the basis of the 45c net rate. Since December 4, 1936, the lower rate has been actually collected in Arkansas.

For the entire period since Feb. 16, 1934, the District Court in this, Texas, case dismissed the bill without prejudice to a new suit for refunds when the last Arkansas case should be disposed of. In view of the fact that the gas company (R. 149) has already pleaded the two year, four year and five year statutes of limitation, the City contends that its bill should not have been dismissed. It assigned as error (R. 414), the action of the District Court in refusing to order a present reduction in rates and in dismissing the bill for the period since Feb. 16, 1934.

Summary as to Rates in the Two Cities.

Texas.

From June, 1930, to the present time, the gas company has charged and collected, and is now collecting, from domestic and commercial consumers in Texas a rate of \$1.00 per MCF for the first MCF per month, with a net rate of 47½c per MCF for all gas consumed above that up to 149 MCF per month, and of 23c per MCF for all consumption above 150 MCF per month.

Arkansas.

For this entire period the gas company has been finally compelled to place in effect in Arkansas a much lower rate, one of 45c net for all consumption up to 100 MCF per month and of 19.8c net for all consumption in excess of 100 MCF per month.

This is true for the period from June, 1930, to Dec. 1, 1933, because a final decree of the United States District Court compelled refunds down to this basis.

For the period from Dec. 1, 1933, to Feb. 16, 1934, this lower rate was collected under said final decree.

For the period from Feb. 16, 1934, to Dec. 4, 1936,

another decree of the same court, now final, has ordered refunds down to the same lower rate basis.

For the period from Dec. 4, 1936, down to the present time, the same lower rate has been, and is now being, charged and collected in Arkansas.

D. Other Proceedings in Texas.

As has been pointed out, the gas company on Oct. 23, 1933, while the first Arkansas injunction case was pending in this court on petition for a rehearing, applied to the Arkansas city council for a large increase in rates. On November 3, 1933, R. 128, it applied to the Texas city council for a similar increased rate. The city council of Texarkana, Texas, is authorized by the City Charter to regulate rates. R. 166. An appeal to the Railroad Commission of the state is provided by Article 6058 of the Revised Statutes, Appendix II. The City Council, on November 14, 1933, R. 173, passed a resolution, which first recited contract rights of the city under the franchise, and then recited that it would hear the application, without thereby waiving the contract rights, for the purpose of determining whether the franchise provisions should be waived.

On Jan. 22 and 23, 1934, (R. 363) a full hearing was held. The detailed findings appear on R. 235 to 322. The order recited that the hearing was held

to enable the council to determine whether the contract was oppressive or unjust and whether it should be waived. The council found that the rate then in effect in Arkansas, and which the contract bound the company to apply in Texas, of 45c net per MCF, was sufficient to pay all expenses, depreciation and a fair return. The Arkansas City Council's finding to the same effect has been upheld by the U. S. District Court in Arkansas, and by the Circuit Court of Appeals for the 8th Circuit, and this court has denied certiorari. The Texas Council refused the increase applied for and refused to waive the contract and ordered the city attorney to continue his efforts in the courts to force the company to carry out the contract by putting the Arkansas rate in effect and by making refunds in Texas similar to those then being made in Arkansas for the period from June, 1930, to December 1, 1933.

As was pointed out, the Federal Court in Arkansas on December 1, 1933, entered its final decree in the first Arkansas case ordering the old or lower (45c net) rate put in effect and ordering refunds down to the basis of that rate for the period since June, 1930. On December 12, 1933, R. 176 and 177, the City Council in Texas adopted a resolution reciting this decree and calling on the company to comply with its franchise and put the lower Arkansas

rate in effect until such time as it might lawfully be changed, and that it make refunds to its consumers in Texas similar to those ordered by the court for the consumers in Arkansas.

The company alleges, R. 366, that on March 3, 1934, it appealed to the Texas Railroad Commission praying it to set aside the resolution of Dec. 12, 1933, and to approve the increased rates it had applied for, but that the Commission (R. 367), as a condition of said appeal, had required it to file a \$10,000 bond, "which the company refuses to file." (R. 376). There the matter stopped. The commission, by pleading filed June 13, 1934, R. 326, stated that it stood ready to hear the appeal if the bond be filed within a reasonable time. The statute, Article 6058 of the Revised Statutes, authorizing such an appeal to the Commission "by filing with it, on such terms and conditions as the Commission may direct, a petition and bond," is printed in Appendix II to this brief.

E. Further Abstract of the Pleadings.

Two separate cases appear in the record. They were consolidated for all purposes. Amended and supplemental pleadings were filed in both. It is not believed to be necessary to abstract them in detail.

The bills of the city alleged the facts which have been hereinbefore stated. The record references are

almost entirely to statements in the pleadings of the gas company. The city also alleged (R. 272) that it was suing both on its own behalf and as representative of all the consumers, of whom there are more than 3500, and all of whose claims are based on the same franchise contract and the same facts.

The last pleading of the City was filed December 30, 1936, (R. 121), after the decree of the Federal District Court in Arkansas was entered in the last Arkansas case (the one in which this court denied certiorari on October 10, 1938), and it brought the facts and the prayer for relief down to date as of that time.

The prayer was (R. 111):

1. That the company be ordered to place in effect as of December 4, 1936, the lower rate it was then collecting in Arkansas.

2. That the company make refunds to the Texas consumers down to the basis of the lower Arkansas rate for the period from June, 1930, to Feb. 16, 1934.

3. That for the period from Feb. 16, 1934, to Dec. 4, 1936, for which the Arkansas consumers had a judgment, then superseded pending appeal, for refunds, the rights of the Texas consumers to similar refunds, in the event the Arkansas decree be af-

firmed, be protected by impounding the same in the registry of the court.

The last answer of the company occupies 113 pages of the record. R. 122 to 225. It pleaded the facts as hereinbefore set out, alleged that the non-discrimination clause (Section IX) of the franchise was invalid, and further alleged facts which, if true, would show that any rate less than the rate applied for by it on Nov. 3, 1933, would confiscate its property. The rate applied for is the same rate as the one at issue in the last Arkansas case in which certiorari has recently been denied. It asked that Section IX be declared void and inapplicable and be cancelled, and that the rates filed by it with the Council be declared lawful rates.

The City moved to strike this answer on the ground that it stated no facts constituting a defense. (R. 228). The court sustained this motion and, the defendant refusing to plead further, a decree was entered on July 31, 1937 (R. 231 to 237).

F. Decree of District Court.

The District Court filed no written opinion. In its decree (R. 231) it held:

1. That Section IX of the franchise is valid and

binding. The company appealed from this holding. R. 242.

2. That it was not applicable to the period from June 13, 1930, to December 1, 1933. The bill in so far as it asks refunds to the Texas consumers for this period was dismissed. The city appealed from this holding. R. 414.

3. That the consumers have refunds from the gas company for the period from Dec. 1, 1933, to Feb. 16, 1934, for the difference between the Texas rate and the lower rate in effect in Arkansas for that period. The company appealed from this. R. 242.

4. That, although from Dec. 4, 1936, a lower rate was actually collected in Arkansas, the company should not be forced to use the same rate in Texas because an appeal was pending from the decree refusing to protect the company in increasing its rates in Arkansas, and that the bill should be dismissed without prejudice to a later suit in so far as it sought to enforce the use of the lower rate in Texas and sought refunds for the period after Dec. 4, 1936, when the higher rate was in use in Texas. The city appealed from this holding. R. 414.

5. That the bill be dismissed without prejudice to a later suit after the final disposition of the Arkansas case in so far as it sought refunds for the

Texas consumers for the period from Feb. 16, 1934, to Dec. 4, 1936. The city appealed from this holding. R. 414.

G. The Decree and Opinion in the Circuit Court of Appeals.

The Circuit Court of Appeals reversed the decree and remanded the cause with directions to dismiss the bill. R. 433.

In its opinion, R. 423, it held that the disputed Section IX of the franchise was completely invalid and that if it were valid it was inapplicable to the facts of this suit. No discussion was had of the second holding. The first holding was based on the argument, which the city believes to be erroneous in fact and in conflict with the statute and the local decisions, that the promise of the gas company not to charge more in Texas than in Arkansas was an attempt to bind the hands of the city council not to exercise the rate regulating powers conferred on it by law, and hence was void.

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in finding and holding that Section IX of the franchise contract is invalid.

2. The Circuit Court of Appeals erred in finding and holding that Section IX of the franchise, if valid, is without application to the facts of this case.

3. The Circuit Court of Appeals erred in reversing the decree of the District Court which applied Section IX of the franchise to the period from December 1, 1933, to February 16, 1934, and which ordered refunds for that period.

4. The District Court and the Circuit Court of Appeals erred in finding and holding that Section IX of the franchise is not applicable to the period from June 13, 1930, to December 1, 1933, and in refusing to adjudge refunds for that period. Assigned as Error on R. 414 and 415.

5. The District Court and the Circuit Court of Appeals erred in refusing to order the gas company to place in effect in Texas the lesser rate which has been in effect in Arkansas since Dec. 4, 1936, and in refusing to adjudge refunds down to the basis of such lower rate for the period since Dec. 4, 1936. Assigned as Error on R. 415.

6. The District Court and the Circuit Court of Appeals erred in dismissing the bill in so far as it sought to have excess collections for the period from February 16, 1934, to December 4, 1936, impounded

in the registry of the court. Assigned as Error on R. 414.

Note: In its petition for writ of certiorari, the city stated four "Reasons relied on for the Allowance of the Writ." These are not here repeated as "Specifications of Error" for the reason that they are all argued below.

The first three "Reasons" were reasons for urging this court to review the decision of the Circuit Court of Appeals that Section IX of the franchise was invalid, and are argued below under Point "A." wherein the City contends that Section IX is valid. These reasons were that the interpretation placed by that court on Section IX and its decision that same was invalid is in violation of the city charter, is a strained, unnatural and erroneous construction of plain words, is in conflict with applicable local decisions, and is untenable and in conflict with the weight of authority.

The fourth "Reason" was a plea to the court, to review the decision of the lower courts as to whether Section IX, if valid, applies to the facts of this case, on the ground that the importance of the questions involved justify the court in reviewing the decisions on this question. The way in which the City contends

Section IX should be applied is argued below under Point "B."

V.

ARGUMENT.

Summary of the Argument.

POINT A.

THE CIRCUIT COURT OF APPEALS ERRED IN FINDING AND HOLDING THAT SECTION IX OF THE FRANCHISE CONTRACT IS INVALID.

1. This holding is based on the interpretation, by that court, of Section IX as an attempt on the part of the City to bind the City Council not to exercise its rate regulating powers.
2. The Court's interpretation of Section IX is erroneous, because:
 - (a) It is in conflict with the plain mandate of the City Charter, which is a state statute.
 - (b) It is in conflict with the applicable decisions of the state courts.
 - (c) It is an unnatural, strained and erroneous construction of plain words.

3. Section IX of the franchise is a valid contract under the state law.

- (a) A utility has no right to use the streets of the city without the consent of the city.**
- (b) The grant of this privilege is a valuable consideration sufficient to bind promises of the utility, including promises as to rates.**
- (c) The gas company is estopped to question the validity of its promise given to obtain a privilege which it is still using.**
- (d) The fact that the city council has the power to regulate rates is not an inhibition to contracts on the part of the utility as to rates.**

4. The fact that Section IX calls for a change in rates without a new ordinance placing the new rates in effect does not render the contract void.

POINT B.

SECTION IX OF THE FRANCHISE IS APPLICABLE TO THE ENTIRE PERIOD COVERED BY THIS SUIT.

1. It applies to the period from December 1, 1933, to February 16, 1934, and the Circuit Court of Appeals erred in holding otherwise.
2. It applies to the period from December 4, 1936, to the present time. The Circuit Court of Appeals erred in holding otherwise, and the District Court erred in refusing to apply it to this period at the present time.
3. Section IX applies to the period from June 13, 1930, to December 1, 1933, and the District Court and the Circuit Court of Appeals erred in holding otherwise.
4. The District Court erred in dismissing, without prejudice, that part of the bill seeking refunds for the period from Feb. 16, 1934, to Dec. 4, 1936; and the Circuit Court of Appeals erred in holding that Section IX was not applicable to this period.

POINT A.

THE CIRCUIT COURT OF APPEALS ERRED IN FINDING AND HOLDING THAT SECTION IX OF THE FRANCHISE CONTRACT IS INVALID.

1. *This holding is based on the interpretation, by that court, of Section IX as an attempt on the*

part of the city to bind the City Council not to exercise its rate regulating powers.

That court's argument as to the validity of Section IX begins at the middle of page 431 of the printed transcript, as certified by the clerk of the lower court.

Section IX reads as follows (R. 18):

"If grantee shall be finally compelled to, or should voluntarily, place in any rates in the City of Texarkana, Arkansas, less than the rates granted by this ordinance then and thereupon the lessened rate shall apply in the City of Texarkana, Texas, and Grantee shall not be authorized or permitted to charge and collect any higher rate."

The reason given by the Circuit Court of Appeals for holding this section of the contract to be void is its interpretation of the section as an attempt to bind the City Council not to exercise its rate regulating function. It said it is "an attempt to mutually bind appellant and the City of Texarkana to any lessened rates which may in the future be fixed within the Arkansas city." The court also said: "It is one purporting to bind the City and the Utility alike to abide by the future action of the Utility and the City of Arkansas." And again the court said: "A more

definite binding of the hands of the City Council, a more complete abdication of its ratemaking function, a more complete delegation of it could hardly be imagined."

We do not here quote all the court said, but as we read the opinion it gave no reason for holding the contract void other than the theory that it was an attempt to bind the City Council not to exercise its rate regulating powers. If the section cannot bear this interpretation, then the court's reason for holding the contract invalid must fall.

2. *The court's interpretation of Section IX is erroneous, because:*

(a) *It is in conflict with the plain mandate of the City Charter, which is a state statute.*

No court can hold that a franchise granted by a city means one thing when the state statute under which the city is organized says it must mean the opposite.

This city was incorporated under a special act of the legislature passed in 1907 (R. 123). This city charter provides:

In Section 163 (R. 165 and in Appendix I hereto), that every franchise "must expressly set forth that

the council shall have the right and privilege of regulating and controlling the operation of all business done thereunder, fixing fares, rates, tolls and charges * * *."

In Section 163a (R. 165 and in Appendix I hereto), that in the event any franchise fails to contain such stipulations, "then it shall, nevertheless, be considered that all of the said stipulations contained in said Sections * * 163 * * are part and parcel of the said contract and franchise, just as though written therein, and the said applicant so accepting such franchise, as well as their heirs, assigns and successors, shall be held and firmly bound thereto notwithstanding such omissions."

Section 196 (R. 166 and in Appendix I), provides that the city council "shall have the power to regulate by ordinance the rates and compensation to be charged by all water, gas, * * * companies." etc.

Under this statute, Section IX must be interpreted as though there were written therein, and as part and parcel thereof, the following clause, or one of similar import:

"* * * provided the city council shall have the right and privilege of regulating and controlling and fixing rates, tolls and charges as authorized by the City Charter."

Such a clause must be considered to be a part of Section IX if the statute be obeyed. With such a clause in it, Section IX cannot be construed as an attempt to promise that the City Council will not exercise its rate regulating powers. It is not, in words, a promise to anyone that the City Council will not raise or lower the rate above or below either the franchise rate or the Arkansas rate as such Council, as a rate regulating tribunal, might find necessary or proper; nor can it, under the statute, be construed to bind the hands of the City Council in any way.

(b) *The court's interpretation of Section IX is in conflict with the applicable decisions of the state courts.*

A similar question was discussed by the Supreme Court of Texas in the case of *Dallas Street Railway Co. v. Geller*, 114 Tex. 484, 271 S. W. 1106 (1925), reported below in 245 S. W. 254 (Court of Civil Appeals at Dallas). The opinion in the Supreme Court is by that court itself,—not by one of its Commissions of Appeals. The reports do not show exactly how the issues got before the court, and for that reason the city has consulted the briefs in the case.

In 1917, the City of Dallas, Texas, granted a franchise to the street railway, which was accepted by

it, which franchise designated five cents as the fare to be charged. That city operates under a charter which invested in the board of commissioners the power to regulate rates. In 1922, the railway asked for an increase in rates and the commissioners granted an increase for a period of one year. The briefs show that the commissioners, in granting the increase, saved what the commissioners believed to be the contract right of the city to a fare of five cents, and provided that the increase was temporary, to meet an emergency, and that at the end of the year the company should return to the five cent fare. This fact is not shown in the reported opinions.

Thereafter one Geller, a citizen of Dallas, brought suit against the railway company to enjoin the increase. The city was not made a party. He claimed that the franchise was a contract and that the company was violating the contract in charging more than five cents because the action of the commissioners in granting an increase was subject to the referendum and such action had been taken in such a way as to prevent a referendum. The city seems not to have been in the case until after the Court of Civil Appeals acted upon it.

The trial court simply dismissed Geller's suit, and he appealed to the Court of Civil Appeals. That

Court held that the franchise was not a contract. This was not an interpretation of the words used, but was based on the argument that a city whose council had the power to regulate rates could not bind a utility as to rates by a contract. That court, however, held further, that the grant of the increase was subject to the referendum and that one should be held.

The street railway appealed to the State Supreme Court. It expressed itself as satisfied with the holding that it could not be bound by an agreement as to rates, but it sought reversal of the holding as to the referendum.

At this stage the City Attorney of Dallas filed a brief as *amicus curiae* seeking to protect the contract right of the city to the five cent fare. He was joined by the city attorneys of a number of other Texas cities. They all asked the Supreme Court to reverse the holding that a city endowed with the power to regulate rates could not make a contract as to rates which would bind a utility even though the city did not try to bind its council not to exercise the rate making power given it by statute.

While the case was pending, one of the Commissions of Appeals of the Supreme Court decided the case of *Uvalde v. Uvalde Elec. & Ice. Co.*, 250 S. W.

140. In that case the city had obtained a promise as to rates from the utility by giving in return therefor its express promise that such rates would be maintained for a number of years. This seems to have been the sole consideration. The city council had the power to regulate rates, and the Commission of Appeals held the contract void. It also argued that a utility could not be bound by such a contract with a city whose council had such powers, even though the city did not attempt to bind its city council,—in other words that such a city could not buy such a promise from a utility for any consideration.

At that time the Supreme Court of Texas had the custom, in many cases, of adopting the recommendation of its commissions of appeals as to the judgment to be entered without approving the reasoning by which the commission reached its conclusion. The opinion was not regarded as a precedent unless expressly approved by the Supreme Court, and the questions discussed were regarded as open questions. This custom was abandoned in 1935. See *National Bank of Commerce v. Williams*, 125 Tex. 619, 84 S. W. (2nd) 691. In the Uvalde case, the Supreme Court did not approve the opinion but adopted the judgment recommended by its commission.

As stated, the opinion of the Commission of Ap-

peals in the Uvalde case came out while the Geller case was pending in the Supreme Court, and briefs were filed arguing the effect of that case.

Such was the situation before the Supreme Court of Texas when it wrote its opinion in the Geller case. The utility had promised a certain maximum fare. The city had made no counter promise as to rates. The Court of Civil Appeals had argued that such a contract could not bind the utility, and this point had been briefed by various city attorneys as *amici curiae* and the court had been confronted, in the briefs, with the unapproved opinion of its Commission of Appeals in the Uvalde case. In these circumstances, the Supreme Court of Texas said, 114 Tex. 484, 271 S. W. 1106:

"Perhaps the city attorneys, *amicus curiae*, are unduly or unnecessarily alarmed, construing, as they do, the opinion of the honorable Court of Civil Appeals to hold that a municipality cannot make contracts that are binding upon public service corporations."

The Supreme Court then discussed various cases cited by the lower court to the effect that the legislative power to regulate rates was limited by the due process clause. The court then said (271 S. W. 1107):

"The right or power to further control or regulate the grant (of a franchise) in regard to the rate schedule is a reservation to the municipality and not an inhibition to contract; and, where a franchise is accepted by a grantee, this reservation provided in the law becomes a part of the contract."

The Supreme Court went on to hold that the grant of the increase in Dallas was an exercise of the regulatory powers granted by the charter and that the lower court was in further error in holding it was subject to a referendum, and reversed the judgment.

Petitioner contends that this opinion of the Supreme Court of Texas shows the law in Texas to be that the existence of the powers of the city council to regulate rates is "not an inhibition to contract," but is a "reservation to the municipality," and becomes a part of the contract. The Circuit Court of Appeals has, in this case, held that a municipality cannot make contracts as to rates that are binding upon public service corporations, and has refused to hold that this reservation provided by the law is a part of the contract, and in so doing it has decided an important question of local law in a way in conflict with the applicable local decisions and in conflict with the way the state courts would have de-

cided this present case. The Circuit Court of Appeals has refused, in the face of the charter and of this decision, to treat the existence of the regulatory power as a reservation in the contract, and has treated such power as an inhibition to contract when the Supreme Court of Texas has said it is not. The question whether a Texas city can make a contract as to rates which will bind a utility is certainly an important question of local law. It is squarely presented in this case. The Supreme Court of Texas has stated its opinion to be the opposite of the conclusion reached by the Circuit Court of Appeals in this case.

- (c) *The court's construction is an unnatural, strained and erroneous construction of plain words.*

On R. 152, the company itself pleaded "The City may not under any circumstances bind itself by contract as to rates."

The company argued that the clause was void as a matter of contract law on the theory that the only consideration which could bind the promise of a utility as to rates is a counter-promise on the same subject matter by the city; and that the city could not and had not attempted to make any promise as to rates.

Section IX says nothing about what the City Council will or will not do in the event rates are lowered in Arkansas. It does *not* say that the Council will not or may not investigate the rates or raise or lower them above or below the Arkansas figure. Where there is no promise as to what the Council will or will not do, the correct rule of interpretation is that stated in *Knoxville v. Knoxville Water Co.*, 189 U. S. 434 at 437, where this court had before it a case where a utility had made a promise as to rates to a city endowed with the power to regulate rates, and there was no express promise by the city as to rates. This court said:

“* * * it seems to us impossible to suppose that any power to contract which the city may have had was intended to be exercised in such a way as to displace the municipal power expressly reserved or given by the general law.”

The actions of the gas company show that it did not regard Section IX as an attempt to bind the hands of the City Council. On November 3rd, 1933 (R. 26), it filed with the City Council an application for increased rates (R. 19). This was before any action with reference to lower rates had been taken by the city, but after court action had made certain the Arkansas rate would be lowered. And

the City Council did not regard itself as bound not to exercise its regulatory powers. It heard the application in order to determine whether the contract rights of the city were oppressive or unfair and whether it, as a rate tribunal, should grant relief from them. Its finding, after what the company describes as a full hearing, was that the contract rate (45c net) was more than sufficient to pay expenses, depreciation and a fair return, and that no relief from the contract should be given. This finding has not been set aside.

As a matter of the meaning of plain words, and as a matter of compliance with the city charter, and in accord with the decision of the Supreme Court of Texas, it must be held that Section IX is not an attempt to bind the City Council not to exercise its rate regulating powers, and that the Circuit Court of Appeals erred in so interpreting the Section. This was the reason assigned by that court for holding the Section to be invalid.

3. *Section IX of the franchise is a valid contract under the state law.*

(a) *A utility has no right to use the streets of the city without the consent of the city.*

No citation of authority is necessary, although this proposition is supported by all the cases cited in the next sub-section of this argument.

Section 160 of the City Charter, reprinted in Appendix I of this brief and pleaded by the company on R. 164, provides that the rights of the city in the use of the streets shall be inalienable to any person, firm or corporation except by license permit or franchise granted by the city in the manner laid down in the charter.

- (b) *The grant of this privilege is a valuable consideration sufficient to bind promises of the utility, including promises as to rates.*

The following cases support the above proposition. The question as to whether the existence in the City Council of the rate regulating power forbids such a contract is discussed in sub-section A-3-d of this argument.

In *Texarkana Gas & Electric Co. v. City of Texarkana*, 123 S. W. 213 (C. C. A., Texarkana), an electric light franchise had been granted, to the predecessor in title to the gas franchise of the present gas company. This franchise required the grantee to furnish free lights for the city hall and jail and

to furnish street lights at specified prices. Later the city tried to levy a pole tax. The court held that it could not do so. The franchise had been granted in consideration of certain promises. The company was bound to carry out those promises. The city could not exact any additional consideration. The court said:

"In granting the right or franchise as it is called, the City can impose conditions or charge a fee for the privilege given, which the applicant can accept or reject at his pleasure; but, having accepted it, *he takes the franchise subject to the conditions imposed and must pay the consideration exacted.*"

The same rule was followed in *City of Terrell v. Terrell Electric Co.*, 187 S. W. 966 (C. C. A. Dallas, 1916). There the court said:

"* * * if the municipality annexes to a grant to enter upon its streets a condition, although without authority to do so, and the grantee voluntarily accepts the grant with the annexed condition, it cannot afterwards refuse to be bound thereby or be heard to deny the authority to impose the same. *Athens Telephone Co. v. City of Athens*, 182 S. W. 42. The rule stated was adhered to in the case cited and was a controlling

issue. Writ of error was denied by the Supreme Court."

In *Athens Telephone Co. v. City of Athens*, 163 S. W. 371, 182 S. W. 42 (C. C. A. Dallas, 1914), the grantee had promised, in consideration of the grant of the franchise, not to charge over \$1.50 per month for telephones. It announced an increase in rates. The city brought suit to enjoin a rate in excess of \$1.50 per month. The trial court granted the writ. This was twice affirmed by the Court of Civil Appeals at Dallas, once on refusal to vacate a temporary injunction and again in affirming the final decree.

The same result was reached in the following cases:

Greenville Telephone Co. v. Greenville, 221 S. W. 995 (C. C. A. Dallas, 1920)

Texas Telephone Co. v. City of Mart, 226 S. W. 497 (C. C. A. Austin, 1920).

In the last case the court pointed out that the utility had no right to use the streets without the consent of the city, and whether the permit be construed as a contract or as merely a license, the licensee must comply with the terms of the franchise as long as it avails itself of the benefits thereof.

The same result was reached in the later case of *Fink v. City of Clarendon*, 282 S. W. 912 (C. C. A. Amarillo, 1926).

In the case of *Cleburne Water, Ice and Lighting Company v. City of Cleburne*, 35 S. W. 733 (1896), a case in which a writ of error was denied by the Supreme Court of Texas, one Moss had obtained a franchise to supply water in the City of Cleburne. Moss' original proposition was that he would charge consumers of water "the same rates as are now charged at Waco, Texas, by said Bell Water System, the rates being the present adopted rates of said system." Certain persons objected to this original proposition. Thereupon Moss submitted a second proposition which was accepted by the Council. In this proposition he called attention to the fact that certain objections had been raised to his original proposition, and he then proposed to "charge consumers of water the same rates as are now charged at Waco, Texas, by the Bell System of waterworks, or such other reasonable rates as from time to time shall be fixed by the Council of the City of Cleburne; it being expressly understood that the limits of water rates shall not be less than is allowed by cities of like size and population in this State."

Moss' successor in title proposed to raise the rate

to a higher one than the rates in Waco, Texas, and the City brought a suit to enjoin him from charging such higher rates. The Court of Civil Appeals said:

"We are of opinion that the contract fixes the Bell rates as a basis, and that the company is bound to furnish water at that rate until the City Council should fix other reasonable rates; and, in the event the City Council saw proper to change the rate, it could not fix a rate less than 'is allowed by cities of like size and population as Cleburne in this State.' From the facts and circumstances it is evident that the contracting parties intended the Bell rates to prevail unless other cities, of the character named, fixed the water rate less than the Bell rates, in which case the city council of Cleburne would have the power to change the rates, provided a less rate was not fixed than allowed by such cities. It was not intended that the city council should fix rates higher than the Bell system. * * * The appellant being bound to supply water at the Bell rates it is unnecessary for us to consider whether the rates attempted to be charged by it are reasonable or unreasonable. If appellant entered into a bad contract it must abide thereby; for in such a case the courts will afford no redress."

As before pointed out, the Supreme Court of Texas denied a writ of error in this case. This case was decided in 1896. The City of Texarkana, Texas, operates under a charter, enacted by the legislature in 1907, which authorizes it to make contracts with utilities, in which contracts *the right and privilege* to regulate rates must be reserved. In 1928, the defendant bought the gas distributing system in Texarkana, Texas, which was then operating under a franchise which provided that the gas company would not charge in Texas higher rates than it was permitted to charge in Arkansas. In 1930, the franchise having expired, or being about to expire, this defendant made a new franchise contract with the City of Texarkana, Texas, which contract provided that if the company should be compelled to give the City of Texarkana, Arkansas, lesser rates than those then granted in the Texas franchise, then it should give the City of Texarkana, Texas, the benefit of such lower rates. There is no essential difference between this case and the Cleburne case above cited. In the Cleburne case the contract was that no higher rates than the Bell rates should be charged, but that the City Council should have the right to fix other reasonable rates, provided it should not lower the rates below the standard charge in cities of like size and population. In the Cleburne case the Court

held that the agreement not to charge higher rates than the Bell rates was a good contract, even though the city might exercise the power to fix lower rates, and that the city was authorized to enforce the contract. We contend that the same conclusion follows in this case. As the court said, in the Cleburne case, it is unnecessary to consider whether the rates called for by the contract are reasonable; if the gas company made a bad bargain it must abide thereby for in such a case the courts will afford no redress.

The City of Texarkana is authorizezd to make agreements with utilities when it grants a license or permit to use the streets. Section 163 of the City Charter, printed in Appendix I, provides that the "franchise shall contain all the terms and agreements between the parties thereo, and shall expressly set forth that the council shall have the right and privilege" of regulating rates. The City of Cleburne in its grant of a franchise reserved a somewhat similar right and privilege. The promise of the utility in that case not to exceed the Waco rates was enforced. Here the promise of the utility is that the rates shall not exceed the rates across the street in Arkansas.

It is submitted, therefore, that under the Texas decisions the promise made by the gas company, not

to exceed the Arkansas rate, in return for the grant of the franchise is supported by a sufficient consideration and is binding on the utility.

- (c) *The gas company is estopped to question the validity of the promise given by it to obtain a privilege which it is still using.*

Some cases so holding have been cited in the last preceding sub-section of this argument. What the city understands to be the general rule is stated in *Todd v. Citizens Gas Company of Indianapolis*, 46 Fed. (2nd) 855, (certiorari denied, 283 U. S. 852), a case decided by the Circuit Court of Appeals for the Seventh Circuit. A franchise, which had been granted in 1905, provided that after the stockholders of the gas company should have received all their investment back plus interest at the rate of ten per cent per annum, then the gas company must convey all its property to the city. The city made a demand that the company convey its property under this provision of the franchise and some of the stockholders sought an injunction in the federal court to prevent the conveyance. They urged many reasons for holding that the city did not have the power to impose the condition in the franchise which it was seeking to have enforced. As to this the Circuit Court of Appeals pointed out that the city did have the ex-

press power to prescribe the terms and conditions upon which gas companies might use its streets, and it then said (p. 866):

“When a municipal corporation has the power to grant or refuse in its discretion permission to a public service company to occupy the streets with its structures, it may grant such permission subject to such conditions as it may see fit to impose, provided they are not against public policy or in derogation of any right which the company may have under its franchise from the state. The municipality, by means of such conditions, may impose obligations upon the company which it would have no power or authority to impose under its general charter powers, and, if the company accepts the grant it is bound by the conditions and is estopped to question their validity.”

In *Athens Telephone Company v. City of Athens*, 182 S. W. 42 (C. C. A. Dallas, 1916), it was urged that the city had no power to exact a promise as to rates from a utility when it granted a franchise. The court held that although a city might not have the power to impose such a condition on a utility without its consent, yet if the company voluntarily accepts rights granted to it with such a condition annexed,

it cannot afterwards deny the authority of the city nor refuse to perform the conditions.

This holding was repeated by the same court in *Terrell v. Terrell Electric Light Company*, 187 S. W. 966 (C. C. A. Dallas, 1916).

- (d) *The fact that the city council has the power to regulate rates is not an inhibition to contracts on the part of the utility as to rates.*

The city has heretofore discussed the case of *Dallas Railway Company v. Geller*, 114 Texas 484, 271 S. W. 1106. In that case, the court was discussing whether a city, whose council had the powers of a rate regulating tribunal, could make a contract as to rates which would bind a utility, and it said:

"The right or power to further control or regulate the grant (of the franchise) in regard to the rate schedule is a reservation to the municipality, and not an inhibition to contract; and where a franchise is accepted by the grantee, this reservation provided in the law becomes a part of the contract."

This, the city contends, is the law of Texas. It is the only time the State Supreme Court has spoken.

The city charter provides that franchises must set

forth all the terms and agreements between the city and the utility and must reserve to the city the right and privilege to regulate rates from time to time.

In *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, the city had the power to regulate rates. The franchise agreement contained a promise on the part of the utility—not on the part of the city—as to rates. This court said (189 U. S. 437):

“People who have accepted, as experience shows that people will accept, a charter subject to such liabilities, cannot complain of them or repudiate them.”

In *Southern Utilities Company v. City of Palatka*, 268 U. S. 232, 69 L. ed. 930 (1925), a franchise bound the utility not to charge more than a certain rate. It attempted to do so. The city brought suit to enjoin a charge in excess of the franchise. The utility pleaded confiscation. The state court held that the contract was good, although the legislature had unfettered power to regulate rates. The company contended in this court that there was a lack of mutuality and so the contract was void. This was the contention of the gas company here. This court said, 268 U. S. 233:

“The argument cannot prevail. Without con-

sideraing whether an agreement by the company in consideration of the grant of the franchise might not bind the company in some cases, even if it left the city free, it is perfectly plain that the fact that the contract might be overruled by a higher power does not destroy its binding effect between the parties when it is left undisturbed. * * * There is nothing in this decision inconsistent with (among other cases) *San Antonio v. San Antonio Public Service Co.*, 255 U. S. 547, 65 L. ed. 777."

In the case of *Peoples Gaslight and Coke Company v. City of Chicago*, 194 U. S. 1, the situation was that the Illinois Legislature had passed a statute authorizing the consolidation of competing gas companies. This statute provided that the consolidated corporation should not increase the price charged by it for gas. There was a consolidation under this statute. Thereafter the city council passed an ordinance directing a smaller rate. The gas company attacked this ordinance in the federal court on the ground that the statutory provision above stated constituted a contract that it might have as much for gas as it had charged prior to the consolidation. This court, through Chief Justice Fuller, held that the statute did not fix a rate which could not be altered by either party, but did fix a rate above which the companies

which consolidated under the provisions of the statute might not go. *It left the city free to regulate rates but placed an obligation upon the consolidated companies not to go above a certain rate.*

In *Cedar Rapids Gas Light Company v. City of Cedar Rapids*, 223 U. S. 655, 56 L. ed. 594 (1912) the franchise provides:

"In consideration of the privileges herein granted to said company it shall furnish to the inhabitants of said city gas for lighting at a price not to exceed \$1.80 per thousand feet, and 20c per thousand cubic feet discount," etc.

With reference to this, the U. S. Supreme Court said (p. 667):

"We are of opinion that there was no contract on the part of the city that the price should be kept high enough to allow a discount for prompt payment. The general power reserved to regulate rates was limited only by the fourteenth amendment. The words relied upon by the plaintiff express its promise in consideration of the privileges granted,—not a promise by the city. *Knoxville Water Company v. Knoxville*, 189 U. S. 434, 47 L. ed. 887. It is true that the contract was in the form of an ordinance,

but the ordinance was drawn as a contract, to be accepted, and it was accepted by the plaintiff; it contained reciprocal undertakings, the one in question being that of the plaintiff as we have said; and it was subject to power retained by the city to regulate rates. *That power, it was expressly provided by Iowa statute, was not to be abridged by ordinance, resolution or contract.*"

In *Henderson Water Company v. Corporation Commission*, 269 U. S. 278, 70 L. ed. 273, the water company was bound by an agreement as to rates. The Commission had authority to relieve it from this agreement. The company applied for higher rates. The Commission permitted higher rates for a six months test period. At the end of this period, the company, without going again to the commission, filed a bill to enjoin it from interfering with the collection of the higher rates. This court, through Chief Justice Taft, held:

"It was not entitled to any judicial relief from this situation, however inadequate the rates.
* * * Only by securing the waiver of the franchise rates by order of the corporation commission speaking for the state, did the Water Company have any standing to ask for a fixing of

rates in excess of the franchise rates. * * * It was, therefore, plainly within the power and discretion of the commission after granting partial relief to delay further action in the same proceeding until it could satisfy itself by actual trial to what extent its waiver should go."

Here the city council, as a rate tribunal, held a full hearing to determine whether the contract should be waived. An appeal lay to the State Railroad Commission, which commission was a party to this suit and pleaded (on June 13, 1934, R. 323-326) that it was ready to hear this appeal if within a reasonable time the company filed a bond, which the state statute authorizes the commission to require on such appeals. The company refused to file the bond.

If we assume that it was the duty of the Council or the Commission to grant relief from the promise, the duty is one arising under state law for the breach of which a state remedy alone should be given.

In the *Los Angeles Street Railway case*, Mr. Justice Stone said, 280 U. S. 145 at 168:

"Granting that the contract was subject to the power and duty of the Commission to modify it by changing the rate, that power has not been exercised and the duty is one * * * imposed

by statute, for the breach of which a state remedy alone should be given."

In *Harris v. Municipal Gas Company*, 59 S. W. (2nd) 355, it was held that the Commission was authorized to demand an appeal bond. In *Boz v. Newsome*, 43 S. W. (2nd) 981, it was held that where the Commission erroneously refused to hear an application made to it, the proper remedy was mandamus to force it to do so, and that the applicant was not at liberty to treat his application as granted.

The gas company in this case has contended that the fact that the city council is endowed with the power to regulate rates prevents it from binding the utility by any promise on the utility's part as to rates, even though the city in the contract does not purport to bind the city council as to the exercise of its rate regulating powers. Of course the power to regulate cannot be bartered away without specific statutory authority, but it does not follow, as the gas company contends, that, because the city cannot bind the officers who are members of its city council, the utility cannot bind itself by a promise which it must keep until it is relieved therefrom by an exercise of the regulatory power.

The gas company has argued that the city cannot make it a promise as to rates and that any promise

the company makes to the city as to rates, no matter what price be paid therefor by the city, is void for some supposed lack of mutuality. It succeeded in finding one opinion supporting this theory,—an opinion which says that such a “contract is that sort of contract which the law requires to be bilateral.” This was the opinion of Judge Faris in *Nebraska Gas & Electric Company v. City of Stromberg*, 2 Fed. (2nd) 518. This is here referred to as the opinion of Judge Faris for the reason that of the three judges who sat on the case, one (Judge Lewis) dissented and another (Judge Sanborn) “concurs in the result.” In that case the city had the power to regulate rates and did not try to bind itself as to rates, but the utility did bind itself. Judge Faris found the contract void. Stripped of its verbiage about “mutuality” and “bilateral contracts” his opinion was that the only price which would bind the promise of a utility as to rates was a counter-promise on the same identical matter. Outside of marriage contracts, and perhaps other similar matters, there is no principle of law which requires that the consideration to bind a promise must be a promise on the other side on exactly the same subject matter.

The gas company has also cited the following cases in support of its contentions:

San Antonio Traction Co. v. Altgelt, 81 S. W. 106,
200 U. S. 304, 50 L. ed. 491.

City of San Antonio v. San Antonio Public Service Company, 255 U. S. 547.

In the *Altgelt* case there was a street railway franchise providing for a five cent fare. In 1903, the state legislature passed a statute providing reduced rates for school children. *Altgelt* brought a mandamus action to compel compliance with this statute. The street railway company defended on the ground that the franchise was a contract and the statute was an impairment of it. The state Court of Civil Appeals did *not* pass on the question whether the franchise was a contract. It simply held that *if it was a contract*, then there was no impairment of it because it was subject to the provision of the state constitution that all such contracts might be reformed by the legislature. The power of the legislature to regulate rates cannot be relinquished by any act on its part or on the part of a city. This court said (200 U. S. 308), that, "assuming, but not deciding," that the ordinance was a contract, the question still remained whether the act of the legislature impaired its obligation, and then said:

"Even if construed as a contract it was still subject to the provision of the Constitution of

1876, which in section 17 of the Bill of Rights declared that no irrevocable or uncontrollable grant of special privileges or immunities should be made but that all privileges granted by the legislature or created under its authority shall be subject to the control thereof."

This same matter came before this court in a different way some years later in the second case, *City of San Antonio v. San Antonio Public Service Company*, 257 Fed. 467, 255 U. S. 547. Here the company sought an increase in rates under the rate regulating power of the council and the council refused it on the ground that the same old franchise was a contract for a five cent fare.

The District Court went squarely upon the theory that because the city could make no contract as to rates which the legislature could not alter, then that the city could make no contract at all. This was decided as a matter of general law, not of Texas law, and is in conflict with the later decision of this court in the *Palatka* case, 268 U. S. 232, hereinbefore discussed. The later remarks of the Supreme Court of Texas are cited below.

This court, 255 U. S. 547, affirmed the decree of the District Court. The suggestion was here made that although the city could not make a binding

promise that the rate would not be lowered, nevertheless there was a unilateral contract which bound the company to the franchise rate. As to this, this court said (255 U. S. 556) "there is not the slightest suggestion of any attempt on the part of the parties consciously to produce such a condition." In this *Texarkana* case, the city, whose charter provides that every franchise must reserve the privilege to regulate rates, and the utility entered into a contract which consciously and expressly attempted to bind the utility to give to Texas consumers the benefit of any lesser Arkansas rate. This court went on to say, in the *San Antonio* case, that from the time of the *Altgelt* case, the conduct of the city and the street railway showed that they did not treat the franchise as a contract.

This court, in the *Palatka* case, 268 U. S. 232, wherein it held that the fact that the legislature has the power to lower rates did not prevent a contract which was binding until that power be exercised, said that its decision was not inconsistent with this *San Antonio* case.

This is, however, a question of Texas law, and whatever effect this court might otherwise be constrained to give to its own opinions, should the city contends, yield to the views of the Supreme Court

of Texas as to the effect of contracts made with utilities by Texas cities. In the case of *Dallas Railway Company v. Geller*, 114 Tex. 484, 271 S. W. 1106, the Court of Civil Appeals had relied strongly upon the *Altgelt* case and the San Antonio case in reaching its conclusion that a utility could not be bound by a contract with a city as to rates. The Supreme Court of Texas, in reviewing the opinion below, pointed out that the lower court had relied on the *Altgelt* and San Antonio cases, and then quoted from the opinion in the state court in the *Altgelt* case where that court said that legislature had the power to regulate rates, provided the rates so fixed were not so unreasonable as to amount to depriving the company of its property without due process. It then quoted from the opinion of this court where it was assumed, but not decided, that the franchise was a contract, and where this court then held that if it was a contract it was subject to the constitutional provision that no irrevocable or uncontrollable grant of special privileges could be made but that all such grants should be subject to the control of the legislature, and where this court then went on to say that the legislature could not reduce the fares to a confiscatory amount. The Supreme Court of Texas then said (271 S. W. 1107):

“With this construction as limited and defined in the cases last cited we are in accord.

We incline to the view that the honorable Court of Civil Appeals intended to go no further than to hold in accord with the above mentioned case of *San Antonio Tr. Co. v. Altgelt*, (Tex. Civ. App.), 81 S. W. 106, in which this court refused a writ of error, and with the Supreme Court of the United States in the same case (200 U. S. 304) and the other cases cited above, *wherein it was held that a rate schedule as in this case is subject to legislative control within the limitations of the constitution and the laws which control the rights of property.* This holding in this case in no wise contradicts the holding in the case of *Mayor, et al, v. Houston Railway*, 83 Tex. 518, 19 S. W. 127.

“The right or power to further control or regulate the grant in regard to the rate schedule is a reservation to the municipality, and not an inhibition to contract; and, where a franchise is accepted by a grantee, this reservation provided in the law becomes a part of the contract.”

Thus the Supreme Court of Texas, with the opinions of this court in the two San Antonio traction cases before it, was of the opinion that under the law of Texas a utility could be bound by a contract

with the city notwithstanding the existence of the reserved power of regulation.

The gas company has also relied on the case of *Houston v. Southwestern Bell Telephone Company*, 268 Fed. 878, 259 U. S. 318, in support of its contention that a city having the power to regulate rates cannot for any consideration purchase from a utility a promise as to rates which will bind it until it is relieved therefrom by an exercise of the regulatory power. That case does not so hold. There the contract was that, in the exercise of the regulatory power, the basis of valuation should be, not present value as this court had held, but the capital actually invested. The case arose at a time of very high prices, immediately after the government returned the property to its owners in 1919. It should be noted that whatever this court had to say about the contract may be regarded as *obiter dicta* because the trial court found, and this finding was not reversed, that even on the basis of book value, or capital actually invested, the rates in controversy were confiscatory. Hence it was not necessary for this court to pass on the validity of the contract. This court nevertheless held the contract to be void. This conclusion as to this contract is probably correct as a matter of Texas law because it is not conceivable that a rate tribunal, which cannot waive its pow-

ers, can contract that those powers be exercised in a different way or on a different basis than those provided by law. Such a principle does not conflict with the ruling in the *Henderson Water Company Case*, 269 U. S. 278, that a utility is bound by a contract as to rates until such time as it be relieved therefrom by the state. It should also be noted that in the *Houston* case there was an attempt to bind both parties on the same subject matter,—the manner in which the regulatory power should be exercised, and the conclusion that if one party could not be bound the other party was not bound is certainly a logical conclusion under the law of contracts. Here in the *Texarkana* case there was no effort to bind the city council in any way,—either not to regulate nor as to how it should regulate nor as to anything else.

4. *The fact that Section IX calls for a change in rates without a new ordinance placing the new rates in effect does not render the contract void.*

The gas company has argued that Section IX is void on the following theory. Under the Texas statute as to *railroad rates* as interpreted by the courts, *railroad rates* can only be changed by an order of the commission. If a railroad wants to lower

a rate it must first get an order from the commission. For this reason, the Texas courts have held that when a Texas intra-state rate is found unreasonable, and ordered reduced, there can be no award of reparation. Railroad rates can be "made" only by a commission order, and the commission can establish only an "absolute rate." It cannot fix either maximum or minimum rates. Such is the effect of many of the cases cited by the gas company in its response to the petition for writ of certiorari. None of these cases bear on utility rates in cities.

The gas company has argued that this rule applies to gas rates,—that a gas rate can only be "made" by an ordinance of the city council, that Sextion IX, in providing that the rate should be changed if the Arkansas rate be lowered, calls, therefore, for an illegal change in rates, and that, if valid, it cannot operate to give the Texas consumers the benefit of a lower Arkansas rate until the rate making body passes a new ordinance prescribing the Arkansas rate as an absolute rate.

This may have been what the Circuit Court of Appeals had in mind, although it does not say so. Its opinion constantly refers, not to the power to "*regulate*" rates, but the power to "*make*" rates. That court, and the learned judge who wrote its opinion,

have had occasion to deal with reparation under intra-state railroad rates in Texas. It is difficult to believe that so learned a court can think, in the face of plain language of Section IX and in the face of the City Charter, that Section IX is really an undertaking on the part of the city to bind the city council not to exercise its rate regulating powers, if occasion demands, by fixing a rate either higher or lower than the Arkansas rate. Yet that court can say: "A more definite binding of the hands of the City Council, a more complete abdication of its *rate making* function, a more complete delegation of it could hardly be imagined." Such language from such a court is understandable to the city only upon the guess that what the court had in mind, without expressing it, was that gas rates in cities are like intra-state railroad rates in Texas,—rates which can only be "made" by an ordinance placing a new definite rate in effect.

Such a theory is wrong. It is not the law in Texas that gas rates can only be "made" by an order of a rate tribunal, that any rate other than an "absolute" rate, prescribed in the order of a rate tribunal, is unlawful. Even in the case of the Railroad Commission the rule as to gas rates is different from the rule as to railroad rates. The statute, which gives the Commission some jurisdiction over gas rates,

provides that if the Commission finds a gas rate to be unreasonable it may award reparation. See Article 6055 of the Revised Statutes, printed in Appendix III to this brief. The cases relied on by the gas company all have to do with railroad rates.

As to the rate regulating powers of city councils, it is not the law that every city utility rate must be put in effect—must be “made”—by an ordinance of the council, and it is clear also that the power of the council is not restricted to the establishment of “absolute” rates, that is, rates which cannot be changed, either up or down, except by a new order from the council fixing a new absolute rate.

In *Parsons v. City of Galveston*, 125 Tex. 568, 84 S. W. (2nd) 996, 1000, the Supreme Court of Texas said:

“The right to fix a minimum as well as a maximum rate seems now to be settled.”

In that case the Supreme Court of Texas upheld an ordinance fixing minimum fares for taxicabs. It quoted with approval the decision of the court of civil appeals in the case next cited.

In *Community Natural Gas Company v. Natural Gas & Fuel Company*, 34 S. W. (2nd) 900 (C. C. A., Austin, 1930), there were two competing gas com-

panies in the City of Brownwood, a city whose council had the power, under the general statute, to regulate rates, and from whose rate orders the same appeal lay to the Railroad Commission as lies from rate orders of the Texarkana City Council. Both companies operated under franchises. The franchise rates of the Community company were the higher rates, and the council, after a hearing, ordered a reduction in these rates. The Community company appealed to the Railroad Commission, and while this appeal was pending, the parties agreed on a compromise, and the council embodied the compromise in an ordinance fixing maximum rates. (The court specifically points out (p. 902) that the franchise rates of the Fuel Company were not designated as maximum rates.)

The Fuel Company then reduced its rates below its franchise rates. The Community Company promptly responded with a drastic rate reduction, and the Fuel Company then brought suit to enjoin the Community Company from charging less than the compromise rates set up in the ordinance above referred to. The trial court awarded the injunction.

The Fuel Company contended, just as the respondent gas company here has contended, that the ordi-

nance fixing the Community Company's rates was an exercise of the rate regulating powers of the council and that no other rate could lawfully be charged by that company until a new rate making ordinance be passed. The Community Company, on the other hand, contended that the statute only authorized the fixing of maximum rates. Both contentions were overruled.

The court first said (p. 902): "Whenever the question has arisen, this power has been construed as extending, not only to the fixing of maximum, but also of absolute rates."

The court then went on to hold that the action of the city council of Brownwood were not a fixing of absolute rates. It said, p. 902:

"We do not regard the action of the city in granting the several franchises and amendments thereto as an exercise of its rate-making powers under Article 1119. * * * All that it did, as we interpret the several franchise ordinances, was to fix maxima for each corporation, leaving them free to compete in the matter of rates within the maxima."

The court therefore dissolved the injunction, because the judgment below was "necessarily based upon the proposition that, under the Community

Company's franchise and Article 1119, it could not make rates below the maxima without further authority from the city." The court went on to say that whether either a minimum or an absolute rate should be fixed was a question for the city council, that it had not yet fixed an absolute rate, and that, until it acted, the court could give no relief from the rate war.

In *City of Seymour v. Texas Electric Service Co.*, 66 Fed. (2nd) 814 (C. C. A., 5th Circuit, 1933), a minimum rate ordinance had been passed to protect a municipally owned light plant. The ordinance expressly stated the rates were minimum rates and any utility could charge as much more as it desired. The rival light company sought to enjoin the enforcement of such a minimum rate. The court, after reviewing the cases, and citing among others the *Community Company* case in 34 S. W. (2nd) 900, held that the Council had authority to fix a minimum rate, and the court then said:

"The Texas cases cited hold that the authority conferred by statute to regulate is authority not only to fix the same minimum rates, but the same absolute rates for municipally and privately owned utilities. * * * in owning and operating a utility plant a city acts not in a govern-

mental but in a proprietary capacity; when the council, exerting the power to regulate, comes to fix rates it represents not the city, as proprietor, but the state as regulator. It exerts not the contractual power of the city, but the sovereign power of the state."

The court, in its further discussion, pointed out that cities have power to contract as to rates as well as power to regulate rates. In this connection the court is asked to recall the holding of the Court of Civil Appeals in the Community Gas Company case above, that the action of the council in granting a franchise, setting out the rates, was not an exercise of the council's rate regulating powers. The court, in the City of Seymour case, said (66 Fed. (2nd) 817):

"The right to contract for rates and the right to exert the police power in regulating them are entirely distinct powers. The first, the city has under its general powers; the latter, it has only when a statute has conferred it."

The law of Texas, as stated in the above cases, is that a Texas city has two classes of powers as to rates. The rate set up in a franchise contract need not be the result of an exercise of the rate regulating powers. When it comes to the exercise of the

rate regulating powers, there is no requirement that "absolute" rates be fixed,—that is, a rate which must be explicitly followed without variation until a new rate order be made. The city may fix either an absolute or a maximum or a minimum rate, and what rate it has fixed in any particular instance must be determined from the order made and from an examination of the circumstances.

The fact that there may be a lawful rate in a Texas city other than an absolute rate is recognized by the gas company in this case. The very Section V of the 1930 franchise (R. 13-16) which the gas company now contends fixes an absolute rate because, according to its contention, no other kind of rate can be legally fixed, permits the company to determine its own rates as to large consumers by private contract with such customer. The application filed by the company on November 3, 1933, for an increase of rates asks for permission to fix rates by private contract not only with *all* industrial consumers (not merely the large ones as did the franchise of 1930) but also with large commercial consumers. It is certainly anomalous for the company to contend that the only legal way to establish rates is by an order from the Council fixing an "absolute" rate, when it is now and has been operating under a franchise which permits it to fix rates by private contract, and

where it asked authority to enlarge the class of consumers whose rates might be so fixed.

Assuming then, what the cases show to be the law, that there is no requirement that rates in cities be fixed as "absolute" rates, but that either minimum or maximum or absolute rates may be fixed, it remains to consider what was done when the franchise of 1930 was granted and accepted.

No reason existed for fixing either absolute or minimum rates as to domestic and commercial consumers. There is no competing gas company in Texarkana.

Next, it is very doubtful if there was any exercise of the power to fix or regulate rates. There was an exercise of the power to contract.

The gas company had applied for an increase in rates. The city council, as the rate tribunal, had refused the increase and the company had appealed to the Railroad Commission. While the Commission was sitting in Texarkana hearing the appeal (R. 125), a compromise was agreed upon, the parties agreeing to a smaller increase than the company asked and the city agreeing to grant a new franchise, on certain conditions, to replace the existing franchise which was about to expire. The franchise itself states (R. 13) that the rates are determ-

ined by "compromise agreement." Rate tribunals do not make compromise agreements. The gas company says (R. 133) "that the city insisted upon Section IX being a part of the agreement. The agreement recites (R. 13) that the rates to be charged "are hereby determined and fixed by compromise agreement." The city (R. 133) initiated and inserted Section IX as a part of the agreement. Section IX is an essential part of what was done, and must be considered in determining whether what the council did was to fix an absolute rate, or whether it was making an agreement as to maximum rates, which agreement had to be and was subject to the possible future exercise of the regulatory power.

In the *Community Company case* (34 S. W. (2nd) 900) the court held, under similar circumstances, that the granting of a franchise was not the fixing of an absolute rate. "All that it did, as we interpret the several franchise ordinances, was to fix maxima."

What the Council did in this compromise agreement was to grant maximum rates, and it embodied in this grant of a maximum the proviso that the maximum rate should not exceed the Arkansas rate. The company accepted the grant "with its terms and provisions (R. 19).

Such a provision cannot be regarded as a delegation of the rate regulating power of the city council. It is simply an agreement on the part of the gas company do to what it is already legally bound to do. Discrimination is one of the oldest bases for the exercise of the rate regulating power.

In border town situations, such as that at Texarkana, the question of discrimination against the citizens of one state or the other constantly arises and has to be constantly guarded against. In *Bolinger v. Watson*, 187 Ark. 1044, 63 S. W. (2nd) 642, the Supreme Court of Arkansas had before it the gasoline tax statute of that state which imposed a six cent per gallon tax, but provided that in the border towns the tax should be at the rate fixed by law in the adjoining state, but not to exceed six cents. As a result of this, the tax in Texarkana, Arkansas, was at the Texas rate of 3 cents, in towns on the Missouri line was at the Missouri rate of 2 cents, etc. The court upheld the statute as a practical means of dealing with a special situation. The same thing arose in the matter of sales taxes, and that court again upheld a similar treatment of the same problem in *Wiseman v. Phillips*, 191 Ark. 63, 84 S. W. (2nd) 91.

If a state, in imposing taxes, may deal with this

special situation in this way, no reason can be imagined why a utility serving both sides of a border city may not bind itself not to charge a higher rate in one state than in the other,—why it may not bind itself, in return for the grant of the privilege of using the streets, not to force the city to call upon the rate regulating powers of its city council in order to prevent discrimination but to accept and abide by the lawful rate in the Arkansas city as the maximum rate in Texas. Such a promise of the gas company can only be regarded as a delegation of the rate regulating powers of the city council upon the erroneous theory that there can be no legal change in rates in a Texas city except a change “made” or “imposed” or “prescribed” by an order of the rate tribunal establishing an “absolute” rate. That theory may be the law as to railroad rates in Texas, but it is not the law as to gas rates in cities and no statute and no decision indicates that it might be the law. On the contrary, the cases show that rate tribunals may fix either maximum or minimum or absolute rates, and further that the rates in cities may not only be “fixed” by rate regulating tribunals but may be agreed upon by contract between the city and the utility, provided that such contract is subject to the exercise of the regulatory power which cannot be waived. Under such precedent as there is (*Hender-*

son Water Company v. Corporation Commission, 269 U. S. 278), such a contract binds the utility until the regulatory power grants relief therefrom. Here the regulatory tribunal, the city council, after hearing, found that no relief should be granted. The gas company appealed to the Railroad Commission, which has power as a regulatory tribunal to grant relief, and then refused to file the bond demanded by that commission,—a bond in the sum of \$10,000,00. The city believes the statute gives the Commission power to demand a bond. The company contends otherwise, but the Texas courts have said that in the event the Commission erroneously refuses to consider a matter brought before it the proper remedy is mandamus to compel it to do so. See *Box v. Newsom*, 43 S. W. (2nd) 981 (C. C. A. Waco, 1931).

No reason exists which prevents a city and a utility from making an agreement, subject of course to the future exercise of the regulatory power, for a simple remedy against discrimination. Discrimination as to rates is unlawful and the Texas courts have held that they have power to prevent such discrimination by injunction without any action from any rate regulating tribunal. This holding also sheds light on the error of the gas company's contention here that there can be no lawful rate except an

"absolute" rate, "made" by a formal order of a rate regulating tribunal.

Dallas Power & Light Company v. Carrington, 245 S. W. 1046 (C. C. A. Dallas, 1922), presents these facts. The Town of Highland Park is a suburb of Dallas, Texas, but is a separate municipality. The same light company served both municipalities at the same rates. In 1920, it divided its territory into two districts, one being the town and the other being the city. Rates in the town were raised above those in the city. Many persons in the Dallas district resided at much greater distances from the power plant than persons in the Highland Park district. The town council tried in various ways to force the company to use the same rates in Highland Park as in Dallas. All these attempts were held void for one reason or another. Then some consumers in Highland Park brought suit to enjoin further discrimination. Article 1125 of the Revised Statutes authorizes courts to enjoin all extortionate and unreasonable rates. The court found that both the city and the town were served by the same plant. The consumers in Highland Park lived no further from the plant than the citizens of Dallas and it cost no more to supply them than it cost to serve a great many Dallas consumers. The company could zone or classify all its customers, but it might not do this on the

basis of town lines. Such zones must be based on physical situations and conditions. The court thereupon enjoined the discrimination involved in fixing rates purely upon a city limit basis. The court also held that it made no difference that the company could not earn a fair return on its whole business. It must earn such a return without discrimination based on arbitrary zones or districts, based purely on city limits.

Such being the law, there can be no public policy which forbids an agreement on the part of the gas company that higher rates in Texas than in Arkansas would be unjust discrimination and that it will avoid such discrimination. All the gas for both towns is delivered to the distributing plant in Texas. Certainly many, if not all, of the Texas consumers are much closer to the city gate than the majority of Arkansas consumers. No public policy can forbid the parties from settling by agreement that no reasons exist for higher rates in Texas than in Arkansas and that there will be no higher rates in Texas than in Arkansas.

So far as the City knows, there can be no reason for holding such an agreement to be void or unenforceable except the erroneous theory that there can be but one lawful rate in a Texas city and that is an

"absolute" rate which can not be varied except by a new formal rate order of the City Council putting a new rate in effect. The cases cited above show that this theory is erroneous; that franchise rates are not always rates fixed by a rate tribunal but may be contract, "compromise agreement," rates; and that when the council, as a rate tribunal, does "fix" rates it may fix either a maximum or an absolute or a minimum rate.

The city thinks the franchise rates of 1930 in this case were fixed by agreement, a part of which was that in no event should the company charge more in Texas than in Arkansas. If the franchise be construed not as a contract but as an exercise of rate fixing powers, then the rate fixed was a maximum rate with the condition that in no event should the maximum exceed the Arkansas rate. The action of 1930 cannot be construed as a fixing of an "absolute" rates, except by disregarding the statement in Section V that the rates are arrived at by compromise agreement and by treating Section IX, which the gas company says the city insisted upon as a part of the agreement, as though it were not in the franchise at all.

It is submitted that Section IX of the franchise

is a valid agreement fixing maximum rates and that the City should be able to enforce it in this case; and that the Circuit Court of Appeals erred in holding otherwise.

POINT B.

SECTION IX OF THE FRANCHISE IS APPLICABLE TO THE ENTIRE PERIOD COVERED BY THIS SUIT.

1. *It applies to the period from December 1, 1933, to February 16, 1934, and the Circuit Court of Appeals erred in holding otherwise.*

From June 13, 1930, to December 1, 1933, the gas company charged in Arkansas the higher rate obtained by the compromise agreement of 1930. On December 1, 1933, it was ordered by a final decree of the United States District Court in Arkansas, copied in full at R. 68 and following, to cease charging the higher rate in Arkansas and (R. 72) to charge the lower (45c) rate on all bills after that date, which lower rates are set out in full in that decree. This was a final decree, rendered in compliance with the mandate of the Circuit Court of Appeals for the Eighth Circuit in a case where this court had denied certiorari and then overruled a petition for rehearing thereon.

In compliance with this decree the gas company charged the lower rate in Arkansas until February 16, 1934. The District Court in Texas held that Section IX applied to this period and ordered the company to make refunds to its Texas consumers for this period.

The Circuit Court of Appeals held that Section IX was not applicable at all, and reversed the decree. It did not explain this holding.

There are only two possible bases for this holding. Neither basis can justify it.

The first is an argument of the gas company to the effect that prior to December 1, 1933, it had applied to the Arkansas city council for an increase in rates and that the application was pending at the time the decree was entered and so its compliance with the decree was not a final compulsion but merely a temporary interlude between losing one case as to rates and getting into court with the next case, which it did on February 16, 1934.

This argument cannot be sound. The court knows there is no *res judicata* in these rates cases. A utility can apply to a rate tribunal at any time for an increase in rates and the tribunal must hear it, and years of time can be, and usually are, consumed before the tribunal and the courts can dispose of the

matter, and then the utility is free to start all over again. The case which the gas company began in Arkansas on February 16, 1934, was finally disposed of on Oct. 10, 1938, when this court denied certiorari, and the time for asking a rehearing thereon will not have expired when this brief is filed. The fact that a new application may be filed before or soon after one decision becomes final does not mean that the gas company has not been finally compelled to lower its rates. The Arkansas decree of December 1, 1933, was a final decree. It directly ordered the company to place the lesser rate in effect.

The second possible basis for the holding that Section IX is not applicable to the period from December 1, 1933, to February 16, 1934, is the theory, heretofore discussed, that there can be no lawful rate in Texas except an "absolute" rate established by an order of a rate tribunal. The city has heretofore shown that this is not true as to utility rates in cities and that there can be contracts as to maximum rates. Section IX is a contract as to a maximum rate to avoid discrimination and it certainly applied to this period when the utility, under an express order of the court, was serving at a lower rate in Texarkana, Arkansas.

2. *Section IX applies to the period from Decem-*

ber 4, 1936, to the present time. The Circuit Court of Appeals erred in holding otherwise, and the District Court erred in refusing to apply it to this period at the present time.

- When the District Court finally disposed of this case the gas company was again charging the lower rate in Arkansas. On February 16, 1934, a temporary injunction had been obtained protecting a higher rate in Arkansas. On Dec. 4, 1936, this injunction was dissolved and refunds ordered down to the basis of the 45c rate for the period covered thereby. An injunction pending appeal was denied (R. 119) and the old 45c rate has been in effect in Arkansas since Dec. 4, 1936. This was called to the court's attention by a supplemental bill and it was asked to order the company to put the lesser rate in effect in Texas and make refunds for all excess collections back to Dec. 4, 1936.

The District Court decree (R. 235), in so far as the bill sought a present reduction in rates and refunds for this period, dismissed the bill without prejudice to a new suit in the event the Arkansas decree be affirmed.

Of course, in July, 1937, when the District Court acted, the outcome of the Arkansas case could not be known. But it was then known that for the period

from Dec. 4, 1936, up to such time as the Arkansas decree of that date might be reversed, if it should be reversed, the company was finally compelled to place the lower rate in effect in Arkansas. Regardless of the final outcome, the rate of 45c was finally in effect in Arkansas for the period from Dec. 4, 1936, until the appeal be finally decided. If the decree had been reversed it could have no effect on the interim period. The order of the Arkansas rate tribunal on December 22, 1933, (R. 114) expressly ordered the company not to increase its rates above the 45c rate. The decree of Dec. 4, 1936, left that order finally and completely in effect until such time as a new decree might be entered.

On December 4,, 1936, and long prior thereto, this suit was pending to force the company to put the 45c rate in effect in Texas.

3. *Section IX applies to the period from June 13, 1930, to Dec. 1, 1933, and the District Court and the Circuit Court of Appeals erred in holding otherwise.*

This ruling of the District Court, and the city's exceptions, appear on R. 234 and R. 237, and are assigned as error on R. 414 (Assignment No. 3 and No. 6).

Prior to May, 1930, the rates in Texarkana, Texas,

and Texarkana, Arkansas, both of which cities were served by the same utility company, were the same. Similar increases were granted about June 1, 1930, in both cities, in Arkansas by an agreement adopted on May 30, 1930, and in Texas, because of delay necessary for publication, in a franchise contract adopted by the city on June 13, 1930, and accepted by the company on June 17, 1930.

The Texas agreement provided (R. 18) that if the company was compelled to, or should voluntarily, place in effect in Arkansas, any rates less than the increase then being granted in Texas, "then and thereupon the lessened rates shall apply in the City of Texarkana, Texas, and grantee shall not be authorized or permitted to charge and collect any higher rate."

The question is, what does this agreement mean? The parties were obviously trying to agree that Texas consumers get the same treatment as to rates as the Arkansas consumers. The sense of the agreement is that the effective date of any lesser rate for Arkansas consumers should be the effective date of such lesser rate to Texas consumers. If it means anything else, let us see what the result will be as applied to the facts here involved.

During the entire period from June, 1930, down to

December, 1933, the Texas consumers have paid a higher rate, which we call the \$1.00 rate.

The net rate paid in Arkansas from June, 1930, to February 16, 1934, was 45c.

Arkansas now has a final judgment for refunds down to a 45c basis for the period from Feb. 16, 1934, to Dec. 4, 1936, and has been actually paying the 45c rate since Dec. 4, 1936. When this judgment has been carried out, Arkansas will have paid 45c from June 13, 1930, to date. Texas has paid \$1.00 all the time. Can the company be allowed, under the meaning of its franchise agreement, to keep all the excess collected in Texas for the whole period when the Arkansas rate was in litigation, that is for the whole of more than eight years, except for the two and a half months from Dec. 1, 1933, to Feb. 16, 1934, when the Arkansas rate was not actually in court?

We submit that this is not the meaning of the contract. Suppose, after the \$1.00 rate had been in effect in Arkansas for six months the company had voluntarily reduced it, effective back to June 13, 1930. Could it be contended that the non-discrimination agreement does not mean that the Texas consumers are entitled to the benefit of the reduction in the same way and to the same extent that the Arkansas consumers get such benefit. Under the

contract there is no difference between a voluntary reduction and one the company is compelled to make.

The contest on the Arkansas rate began at once after it was raised on May 30, 1930. The gas company kept the contest in court until Dec. 1, 1933, when it was compelled to place the old rate of 45c in effect *as of May 30, 1930*. The contract does not mean that by reason of such prolonged litigation, the company can take from its Texas consumers some \$75,000 more than they should pay if they get equal treatment.

The company insists that the emphasis should be placed on the words "finally compelled" in the contract,—that as long as it can keep the Arkansas rate in court there is no discrimination as to Texas. Since December 4, 1936, the Arkansas consumers have been paying 45c although the company has had pending an appeal from a decree refusing to enjoin that rate. The validity of the 45c rate is now finally determined. Under the construction contended for by the gas company, that the 45c rate was not finally compelled in Arkansas until this court had spoken, it can keep the excess collected in Texas for two years, during which time a lesser rate has been actually collected in Arkansas.

Such is not the meaning of the contract. It was

finally decided in Arkansas on Dec. 1, 1933, that the rate from May 30, 1930, to December 1, 1933, was 45c and the company was then finally compelled to put it in effect for that entire period. We submit that then and thereupon the Texas consumers were entitled to the same rate for the same period.

In *III Williston on Contracts* (Revised Edition) Sec. 619, it is stated that in interpreting a contract the main purpose of the instrument will be given effect. The same rule is laid down in Sec. 236 of the *Restatement of the Law of Contracts*. The main and principal apparent purpose of this contract was to prevent discrimination as to rates against the Texas consumers. To carry out the main intention of a contract, words may be transposed, rejected or supplied if necessary to make its meaning clear. In Sec. 617 of the same volume of Williston, it is stated that "The general intent so far as it is manifested is more important than particular words, and the courts will look beyond the form of the agreement and consider the substantive rights created in determining its legal effect."

The Supreme Judicial Court of Massachusetts, in *Koshland v. Columbia Ins. Co.*, 237 Mass. 467, 130 N. E. 41 at 43, in explaining the well known rule that insurance contracts are to be construed against the

insurer in cases of ambiguity, states one reason for the rule to be: "The purpose of such a contract is to indemnify against the losses to which the insurance relates, and *every rational intendment is made by the law to effectuate the main design of the parties.*" There can be no doubt that the main and only design of the city is this contract was to prevent discrimination against Texas consumers—to secure for them the same treatment the company might be compelled to give in Arkansas—and that the company agreed to this as a consideration for getting a renewal of its expiring franchise and of getting an increase in rates "by compromise agreement."

In *Marx v. American Malting Company*, 169 Fed. 582 at 584 (C. C. A. 6th), the court said:

"It is a fundamental rule in the interpretation of agreements that we should ascertain the prime object and purpose of the parties, and, in case of ambiguity produced by its minor provisions, the latter should, if possible, be so construed as not to conflict with the main purpose.

* * * In many cases a more stringent rule has been laid down, which is that, if the minor provision of the contract is irreconcilable with the obvious general intent, it would for that reason

be sacrificed altogether for the promotion of the general purpose of the agreement."

In that case there was a contract for the sale of malt at a fixed price. There were two statements as to the amount. One called for all the buyer's requirements up to a certain date. The other was "amount of malt to be used *will be* between 15,000 and 20,000 bushels." The seller supplied 20,000 bushels and, the price having gone up, refused to supply more. The court said it was clear enough that the parties intended to contract for the year's supply and that the statement of a definite amount should be interpreted to be a mere estimate, or sacrificed altogether.

In the face of this franchise agreement the company cannot contend that any reason exists why it should be permitted to charge more in Texas than in Arkansas. The very least effect that can be given to it is that it is a binding admission on the part of the company that no facts exist justifying a discrimination. The meaning of the contract against discrimination ought to be interpreted in view of the long recognized rule that one against whom a public utility has discriminated can recover for such discrimination. The question as to the measure of damages has been altered by statute, but as we

understand it, the common law rule was applied in *Hays v. Pennsylvania Company*, 12 Fed. 309, (Circuit Court, N. D. of Ohio, 1882). In that case the regular rate for coal was \$1.60 per ton, with a rebate of 30c to 70c per ton to all persons shipping 5,000 tons or more per annum. The plaintiff was a small shipper. He paid the \$1.60 per ton and sued for the excess paid over the rates of his most favored competitors. The court found that the discrimination was unjustified and gave him judgment for such excess. This rule was changed by the Interstate Commerce Act to limit the recovery to actual damages as proven, but it was not until 1913 (*Pennsylvania R. Co. v. International Coal Mining Co.*, 230 U. S. 184, 57 L. ed. 1446), that the Supreme Court held that under the Act the one injured by discrimination must offer any other proof of damages than the difference in rates, and in so doing it reversed a unanimous opinion of the Circuit Court of Appeals and based its decision as to the meaning of the statute upon matters of convenience.

Neither the common law rule nor the statutory rule, which applies to the violation by a utility of its duty not to discriminate applies to this contract. but they are here cited as circumstances to aid the court in determining what is the meaning of the contract. Under both rules, the injured party is entitled to

something for the period during which the discrimination took place,—not merely to an order preventing future discrimination. Where, as here, there is an expressed promise that the rate to one shall not exceed the rate to the other, and there is a violation of this promise, the only adequate relief is to place the injured party in the same position he would have been in if the promise had not been violated.

The whole purpose and intent of the contract was that when lessened rates should apply in Arkansas, they should apply in Texas. The lessened rates applied in Arkansas during the period from June, 1930, to December 1, 1933, although this was not finally decided until December 1, 1933. The decision of the Federal Court in Arkansas did not apply the lower rate retroactively. It simply decided that the lessened rate had applied in Arkansas since June, 1930, and gave effect to that decision through a judgment for refunds of all collections over the rate the court found had been legally applicable.

The cases cited by the company with reference to the refusal of the courts to award reparation when a rate, which has been placed in effect by an order of a rate regulating tribunal, is later found to be too high, have no application here. The rate under which the company collected the excess in Texas,

kana, Texas, is recited in the franchise itself to be "determined and fixed by compromise agreement," (R. 13), which agreement was not effective until accepted in writing by the gas company, and which agreement contained as an integral part thereof, and as an integral part of the rate itself, the promise of the gas company that it would give to Texas the benefit of any lower rates its Arkansas consumers might obtain. In so far as cases with reference to awards of reparation by the Interstate Commerce Commission are relevant at all, the ones which apply here are those which still award reparation where the rate found to be too high is one established by the carrier on its own initiative, rather than the cases denying reparation where the rate found to be too high is one which the Commission had ordered to be placed in effect in the first place.

In connection with the company's contention that the rates set up in the franchise contract of June 13, 1930, were rates placed in effect as a result of an order of the rate regulating tribunal, and its argument, based on the cases refusing reparation in the case of rates fixed by orders of the Interstate Commerce Commission, and various state commissions, that no refunds can be ordered for amounts collected under such rates, the court is asked to consider the case of *Community Natural Gas Co. v. Natural*

Gas & Fuel Co., 34 S. W. (2nd) 900, a case heretofore discussed. In that case maximum rates had been fixed by franchise agreement between a gas company and the city of Brownwood. In competition with another gas distributor the company charged less than the rates fixed in the franchise and the competitor sought to enjoin the company from charging any less than the franchise rates. This relief was denied it, and the Court of Civil Appeals at Austin held that the action of the city in granting a franchise was *not* an exercise of the powers vested in the city council as a rate regulating tribunal, and that, in the absence of an order making an "absolute" rate, a rate lower than the franchise rate was a lawful rate. The "lawful" rate for this entire period was the lesser rate in effect in Arkansas.

In connection with the company's contention that in interpreting the contract emphasis should be placed on the phrase "finally compelled" the situation in Arkansas should be examined in order to ascertain when the final compulsion took place.

As stated, rates in Arkansas were raised by means of a compromise agreement embodied in a resolution of the city council. This resolution was subject to a referendum as was judicially determined in the case of *Southern Cities Distributing Company v.*

Carter, 184 Ark. 4, 285 U. S. 525. Referendum petitions were promptly filed. See 184 Ark. 4 at 6. The Arkansas law provides that when a measure is referred to the people it shall remain in abeyance until the election is held. The election was held and the agreement was rejected and by the decree of December 1, 1933, it was judicially determined that the company had never had the right to charge the higher rate in Arkansas. R. 186. The company was compelled to use a lesser rate in Arkansas all the time from June 13, 1930. The decree of December 1, 1933, was not the final compulsion. It was simply a judicial ascertainment that the final compulsion had taken place long prior thereto, and that the compulsion which had taken place long prior thereto was final at the time it took place.

There can be no escape from the conclusion that for the period from December 1, 1933, to February 16, 1934, the company was finally compelled to use a lower rate in Arkansas because the decree of December 1, 1933, not only judicially determined that there had been prior thereto a final compulsion to use the lesser rate but ordered and directed the company to continue to use it. The fact that there was then pending before another tribunal, an administrative or legislative rate tribunal, an application to be relieved from such compulsion cannot alter the fact

that for that period the compulsion was final and irrevocable.

On December 22, 1933, there was a final order on the part of the administrative rate tribunal directing the company to continue to charge the lesser rate in Arkansas and forbidding it to charge any higher rate. It has taken from February 16, 1934, to October 10, 1938, for the courts to determine that this was a lawful order from which no relief should be given, but the decision of the court is not the compulsion that operates upon the company. The decision of the court is simply a judicial determination that the original order was lawful and valid and final. The thing that compels the company to charge the lesser rate in Arkansas now is not an order of any court but is the final order of the city council of December 22, 1933, which the courts have at last determined was a lawful and proper order, but the fact that the courts have taken such a long time to decide the question does not alter the fact that the order was final on December 22, 1933.

It might be pointed out that the Arkansas statutes provided for a review of the order of the city council before a tribunal which was authorized to enter such order as the council should have entered in the first place if its order was improper. The time for

this review has long since expired. The company instead of seeking this review sought to enjoin the order in the Federal Court on the ground that it was unlawful. The Federal Courts have decided that the order was lawful. The final compulsion took place when the order was made, not when the courts reached the conclusion that it was lawfully made.

It cannot have been the meaning of the contract that the Texas consumers should have to pay, without the possibility of any refunds, the higher rate while the company was trying out in the courts the validity of the Arkansas orders which finally compelled it to place lesser rates in effect in Arkansas.

It is submitted that the court erred in this case in refusing to order refunds for the period prior to December 1, 1933. For this period the rate legally applicable and enforced in Arkansas was a lesser rate than in Texas. To permit the company to keep the proceeds of a higher rate for the same period for its Texas consumers is a violation of the plain meaning of its promise to apply to Texas the benefit of the rates in effect in Arkansas.

4. *The District Court erred in dismissing without prejudice that part of the bill seeking refunds for the period from Feb. 16, 1934, to Dec. 4, 1936, and the Circuit Court of Appeals erred*

in holding Section IX was not applicable to this period.

The finding of the District Court is on R. 235 and the city's exceptions are on R. 236 and R. 237. Error was assigned on R. 414 and 415 (Assignments No. 5 and No. 7).

The facts are that on December 1, 1933, the Federal court in Arkansas compelled the gas company to place the 45c rate in effect in Arkansas. On December 22, 1933, the Arkansas city council, after a hearing, ordered the company to continue to furnish gas at the net rate of 45c. On February 16, 1934, the gas company obtained a temporary injunction under which it collected until December 4, 1936, a higher rate in Arkansas than it actually collected in Texas. On December 4, 1936, this injunction was dissolved and judgment given in favor of the Arkansas consumers for all sums collected during this period in excess of what should have been paid under the 45c rate. This judgment for refunds was superseded pending an appeal. It has now been affirmed, but the appeal was pending when the District Court acted.

During this period, the company collected in Texas a higher rate than the 45c rate.

On January 15, 1934, the city filed (R. 81, its

amended bill in cause No. 106, in which it prayed (R. 61) that the company be ordered to place the 45c rate, then being collected in Arkansas, in effect in Texas.

On May 23, 1934, (R. 264) the city filed its original bill in cause No. 109, in which it prayed (R. 282) that the company be compelled to place the lower Arkansas rate in effect in Texas, and then prayed (R. 282):

"If, for any reason, the Court should find that the defendant should be permitted to continue to charge its present rates pending the determination of said rate litigation now pending as to the rates in Texarkana, Arkansas, then the Court should permit the defendant to continue to charge its present rates *only* upon condition that it give bond, in a sum to be fixed by the Court, conditioned that in the event it is not successful in maintaining the rates which it is now collecting under a temporary restraining order in Texarkana, Arkansas, and is compelled to make refunds down to the basis of a lower rate, then that the Company should also make refunds to its consumers in the City of Texarkana, Texas, down to the basis of such lower rates."

On December 30, 1936, the city filed (R. 121) its supplemental bill in the consolidated cause, in which it prayed that the company be ordered to deposit the excess collections for this period in the registry of the court, and that (R. 113) "the amount of the excess collected during the period from Feb. 16, 1934, to Dec. 4, 1936, be held in the registry of the court pending decision of the appeal in the Texarkana, Arkansas, gas rate case."

The court found that this claim was premature (R. 235) and dismissed the bill as to it without prejudice to a new suit in the event the Arkansas case should be affirmed.

The company had, as to this claim for refunds, already pleaded (R. 149) all the statutes of limitation, the 2 year statute, the 4 year statute and the 5 year statute.

We have no quarrel with the finding that refunds for the period from Feb. 16, 1934, to Dec. 4, 1936, should not have been actually paid out to the Texas consumers prior to the decision of the Arkansas appeal. The city did not ask this. It did ask that the money be paid into court or that a bond be given. Even if the court preferred some other form of protection, we should be content.

But we do contend that the court erred in dismiss-

ing the bill for this period and thus exposing the Texas consumers to the risk of having their rights barred by the statute of limitations. The company has already pleaded the statute and will doubtless do it in a later suit. If either the two year or the four year statute applies, they may now be a defense to a large part of the refunds in a future suit if the present suit goes off the docket.

The lower court ought to be directed to restore this cause to its docket, in so far as this period is concerned, and, the Arkansas appeal being now disposed of, to give judgment for refunds for this period. The Texas consumers ought not be compelled to bring a new suit to which a plea of the Statute of Limitations may be a bar.

CONCLUSION.

It is submitted that the decision of the District Court, that Section IX of the franchise is valid and enforceable, is correct, that the Circuit Court of Appeals erred in deciding otherwise and that its decision is in conflict with an applicable state statute and applicable decisions of the state courts and should be reversed.

It is further submitted that Section IX is applicable to the entire period covered by this suit, from June 13, 1930, to date, and that this cause should

be remanded with directions that there be entered an order to place the lesser Arkansas rate in effect in Texas and to make refunds to the Texas consumers down to the basis of such lesser rate for all amounts collected in excess thereof from June 13, 1930, to date.

Respectfully submitted,

Ed. B. Levee, Jr.
ED B. LEVEE, JR.,

Benjamin E. Carter
BENJAMIN E. CARTER,
*Counsel for Petitioner,
the City of Texarkana,
Texas.*

TEXARKANA, TEXAS,
NOVEMBER 5, 1938.

APPENDIX I.

EXTRACTS FROM CITY CHARTER.

The defendant pleaded (R. 123) that the City of Texarkana, Texas, was incorporated by a special act of the State Legislature which defines and limits its powers.

The following are certain sections of the City Charter pleaded by defendant, which are considered applicable. The italics are ours.

SECTION 160 (R. 164). "The rights of the City of Texarkana in the use of the public streets, alleys, squares, parks, bridges and all public places are hereby declared to be inalienable to any person, firm or corporation, except by license permit and franchise passed by the City Council on the affirmative vote of three-fifths of all the members of said council elected."

SECTION 161 (R. 164). "No franchise, lease or permit to the use of the streets, alleys, squares, parks, bridges or other public places or the use of either or any of them shall be made by the City Council for a longer term than twenty-five years."

SECTION 163 (R. 165). "*Said proposed franchise shall contain all the terms and agreements between the parties thereto, and it must expressly set*

forth that the council shall have the right and privilege of regulating and controlling the operation of all business done thereunder, fixing fares, rates, tolls and charges and inspecting the business and work from time to time as it progresses, and rate regulations shall conform to Section 197 of this charter."

SECTION 163a (R. 165). *"In the event that any franchise or permit is so given by said council, which shall not contain such stipulations therein as provided for in Section 162 of this charter, then it shall, nevertheless, be considered that all of the said stipulations contained in said Sections 162, 163 and 197 are part and parcel of the said contract and franchise, just as though written therein, and the said applicant so accepting such franchise, as well as their heirs, assigns and successors, shall be held and firmly bound thereto, notwithstanding such omissions. As amended by 31st Leg., passed under emergency clause."*

SECTION 196 (R. 166). *"That the City Council shall have the power to regulate by ordinance the rates and compensation to be charged by all water, gas, light and telephone companies, corporations or persons using the streets and public grounds of said city and engaged in furnishing water, gas, light and telephone service to the public, and to prescribe rea-*

sonable rules and regulations under which such commodities shall be furnished and services rendered, and to fix penalties to enforce such charges, rules and regulations; provided, that the City Council not prescribe any rate or compensation which will yield less than ten per cent per annum net *on the actual costs of the physical properties, equipments and betterments*. Said City Council may also fix the charges which may be collected for transporting passengers and baggage in vehicles engaged in public service."

SECTION 37 (R. 164). "The ayes and nays shall be taken upon the final passage of all ordinances or resolutions, and entered upon the minutes of the council by the city secretary, and every ordinance or resolution shall require for its passage an affirmative vote of a majority of all the aldermen elected, except on ordinances or resolutions granting franchises or levying taxes, in either of which events it shall require for the passage of such ordinance or resolution an affirmative vote of three-fifths of all the members elected to the City Council."

APPENDIX II.

Statute as to Appeal to Railroad Commission from
Actions of City Council in Regulating Gas
Rates on Terms and Conditions to
be Prescribed by the Commission.

Article 6058 of Revised Civil Statutes of Texas of
1925:

"When a city government has ordered any existing rate reduced, the gas utility affected by such order may appeal to the Commission *by filing with it on such terms and conditions as the Commission may direct, a petition and bond* to review the decision, regulation, ordinance, or order of the city, town or municipality. Upon such appeal being taken the Commission shall set a hearing and may make such order or decision in regard to the matter involved therein as it may deem just and reasonable. The Commission shall hear such appeal *de novo*. Whenever any local distributing company or concern, whose rates have been fixed by any municipal government, desires a change of any of its rates, rentals or charges, it shall make its application to the municipal government where such utility is located and such municipal government shall determine said application within sixty days after presentation unless the determination thereof may be longer de-

ferred by agreement. If the municipal government should reject such application or fail or refuse to act on it within said sixty days, *then the utility may appeal to the Commission as herein provided.* But said Commission shall determine the matters involved in any such appeal within sixty days after the filing by such utility of such appeal with said Commission or such further time as such utility shall in writing agree to, but the rates fixed by such municipal government shall remain in full force and effect until ordered changed by the Commission."

APPENDIX III.

Article 6055 of the Revised Statutes of Texas is as follows:

"If any rate or charge for gas or for service or for meter rental or any other purpose pertaining to the operation of said business shall be made or promulgated by any person, firm or corporation owning or operating any gas pipe line, or in the event of an inadequate supply of gas or inadequate service in any respect, and complaint against same shall be filed by any person authorized by the preceding article to file such petition and such complaint is sustained in whole or in part, all persons and customers of said gas pipe line shall have the right to reparation or reimbursement of all excess in charges so paid over and above the proper rate or charge as finally determined by the Commission from and after the date of the filing of such complaint."



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 294

CITY OF TEXARKANA, TEXAS,
Petitioner,

versus

ARKANSAS LOUISIANA GAS COMPANY,
Respondent.

**BRIEF FOR THE RESPONDENT IN OPPOSITION TO
THE PETITION FOR WRIT OF CERTIORARI**

**HENRY C. WALKER, JR.,
WILLIAM C. FITZHUGH,
JOHN J. KING,
WILLIAM H. ARNOLD, JR.,**
Counsel for Respondent.

September 12, 1938.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 294

CITY OF TEXARKANA, TEXAS,
Petitioner,
versus

ARKANSAS LOUISIANA GAS COMPANY,
Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

I.

PRELIMINARY STATEMENT.

The opinion of the Court of Appeals by Judge Hutchinson, as is his practice, so clearly and succinctly states the case, the issues and controlling decisions, that it is almost with apologies for presumption that we submit this brief in opposition to the petition for Certiorari to that Court.

The facts, involving several rate controversies in both Texarkana, Texas, and Texarkana, Arkansas, are de-

tailed and lengthy. They are fully set out in respondent's separate amended answer (R. 122-208) and summarized in Judge Hutchinson's opinion (R. 423); 97 Fed. (2) 5, Advance Sheets. Since the statement of facts set out by petitioner materially differs from the statement in the opinion of the Court of Appeals and from the record, reference is made to R. 122-208.

The case involves the question of the validity of Section IX, its construction and effect upon Section V of the natural gas franchise ordinance that was granted to respondent by the City Council of Texarkana, Texas, on June 13, 1930.

Section V of said ordinance recites that a hearing as to the rates to be charged by respondent was had and sets out the prescribed rates. (R. 13). These rates resulted from an application made in 1930 by respondent to the City Council of Texarkana, Texas, for increased rates based upon very substantial extensions of the gas transmission system. Respondent's application was denied by the City Council and respondent appealed in 1930 to the Railroad Commission of Texas. The Commission conducted hearing upon the appeal. In the course of the hearing, petitioner proposed a new rate schedule to respondent, whereupon proceedings were reopened in the City Council and new rates were prescribed and set forth in Section V of the franchise ordinance of June 13, 1930. These rates were lower than those applied for and somewhat higher

than the previous rates. The Railroad Commission approved the new rates and dismissed the appeal pending before it (R. 125). The ordinance of June 13, 1930 containing the Section V rates was accepted by respondent. The rates set forth in said Section V of said ordinance were placed in effect on June 13, 1930, in the City of Texarkana, Texas, and have been maintained at all times continuously from that time to the present time.

Section IX of the ordinance of June 13, 1930 is quoted in the opinion below (R. 423). The situation in Texarkana, Arkansas, is complicated and the litigation affecting rates in that city is still pending and unfinished. The rates in Texarkana, Arkansas, have gone up and down, sometimes lower and sometimes higher than the rates in Texarkana, Texas. Respondent, at all times insisting that the rates in Texarkana, Texas, were governed by Section V of the ordinance of June 13, 1930, which sets out the rates prescribed by the City Council of Texarkana, Texas, by virtue of its regulatory powers, and not by the rates of Texarkana, Arkansas, on November 3, 1933, filed with the City Council of Texarkana, Texas, an application for increased rates (R. 19-26). After a number of sessions of the City Council, the application was denied because of the provisions of the franchise ordinance of June 13, 1930 (R. 285-322), and the City Council refused to exercise its rate regulating powers, (R. 432), but directed the City Attorney to continue the litigation in the courts to enforce compliance by respondent with petitioner's construction of

said Section IX. (R. 320-321). The order also contains a notice that the City of Texarkana, Texas, would "one year from this date enter upon a hearing for the purpose of determining whether or not the rates for domestic and commercial consumers should not be reduced to 40c per thousand cubic feet or less". (R. 321). No such hearing has been had.

On March 3, 1934 respondent appealed to the Railroad Commission of Texas from the order of the City Council of January 23, 1934, denying petitioner's application. Petitioner immediately effectively prevented respondent from proceeding in the Railroad Commission of Texas (R. 182 and 183). On April 21, 1934 it filed motion to dismiss the appeal in the Railroad Commission, or to abate all proceedings in the Railroad Commission and suspend action until the final disposition of the litigation. (R. 183). Petitioner on May 23, 1934 amended its suit to include allegations in support of and a prayer for an injunction against respondent from proceeding in the Railroad Commission (R. 281) and against the members of the Railroad Commission from hearing the appeal of respondent. (R. 272). The Railroad Commission refused to act upon respondent's appeal. (R. 161).

II.

OPPOSITION TO THE PETITION.

1. The Court of Appeals did not refuse to obey the mandate of the statute, nor did it place on Section IX of the city ordinance an erroneous interpretation. The first

reason relied upon by petitioner does not measure up to the rules of the U. S. Supreme Court: no conflict between the court below and applicable local decision is asserted by petitioner under the first reason.

The decision of the court below is in conformity with (a) the applicable local decisions construing state statutes; (b) the decisions regarding abdication and delegation of regulatory power (this being the basis of the decision below); and (c) the decisions touching asserted discrimination and holding prescribed rates paramount. The holding of the Court of Appeals that the effect of Section IX was to abdicate the city's rate-making function for the future and to delegate it to the utility and the Arkansas city (R. 431), is discussed below in the argument under the sub-heading, "(1) *Unlawful Abdication and Delegation of Rate-making Functions*". That the rates set out in Section V of the ordinance of June 13, 1930 prescribed by the city of Texarkana, Texas, in the exercise of its rate-making power, are incontrovertible and paramount, is shown below in the argument under the sub-heading, "(2) *Asserted Discrimination. Prescribed Rates Incontrovertible Except by Change in Due Course for the Future.*"

2. The Court of Appeals in deciding that said Section IX was invalid did not decide an important question of local law in a way probably in conflict with applicable local decisions.

The Court of Appeals said:

"Whatever might be said for the city's side of the case, if, as it assumes, the contract were in effect one in which the utility had agreed, in consideration of the franchise to maintain a fixed rate, we think it perfectly plain that the clause in question is not such a contract." (R. 431).

This decision is not in conflict with the case of *Dallas Ry. Co. v. Geller*, (1925), 114 Tex. 484, 271 S. W. 1106. The proposition argued by petitioner that a utility may be bound by contract to a fixed rate in a franchise, where the city can not itself be bound, was not decided by the Court of Appeals. The Texas jurisprudence, however, does not support such proposition, nor does the *Geller Case*.

3. If the question were one of general law, which patently it is not, the decision of the Court of Appeals is supported by the weight of authority. *Southern Iowa Elec. Co. v. Chariton*, (Iowa 1921), 255 U. S. 539; *Ortega Co. v. Triay*, (Florida 1922), 260 U. S. 103; *Railroad Com. v. Los Angeles Ry. Corp.* (California 1929), 280 U. S. 145; *San Antonio v. San Antonio Public Service Company*, (Texas 1921), 255 U. S. 547; *Houston v. S. W. Bell Telephone Co.* (Texas 1922), 259 U. S. 318.

4. The construction of Section IX of the ordinance is of local importance only and, if enforceable, is without application under the facts and circumstances of the case.

III.

ARGUMENT.**Summary of Argument.**

- A. The Court of Appeals Did Not Refuse to Obey the State Statutes. On the Contrary the Court Interpreted the State Statutes in Accordance With the State Decisions.
 - (1) Unlawful Abdication and Delegation of Rate-making Function.
 - (2) Asserted Discrimination; Prescribed Rates Incontrovertible Except for Change in Due Course for the Future.
- B. The Court of Appeals in Deciding Section IX to be Invalid has not decided an Important Question of Local Law in a Way Probably in Conflict with Applicable Local Law.
- C. The Court of Appeals did not Decide an Important Question of General Law in a Way Probably Untenable. The Proposition Urged by Petitioner is Opposed to the Great Weight of Authority, but No Question of General Law is Involved.
- D. Section IX is Inapplicable, its Conditions not Fulfilled. No Conflict Claimed.

A.

**The Court of Appeals Did Not Refuse to Obey
the State Statutes. On the Contrary the Court
Interpreted the State Statutes in Accordance With
the State Decisions.**

The Court of Appeals did not refuse to obey the mandate of the statute, nor did it place on Section IX of the city ordinance an erroneous interpretation. The first reason relied upon by petitioner does not measure up to the rules of the U. S. Supreme Court: no conflict between the court below and applicable local decisions is asserted by petitioner under the first reason. The decision of the court below is in conformity with the applicable decisions construing state statutes.

It is well settled in Texas that all acts of a city beyond the scope of its powers are void; that the methods prescribed in the law for exercise of the powers of a city exclude all other methods and must be followed. This is evidenced by the language of the Supreme Court of Texas, quoted and followed in the important recent case of *Texas La. Power Co. v. City of Farmersville*, (1933, Commission of Appeals, Judgment adopted by the Texas Supreme Court), 67 S. W. (2) 235:

"Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void. . . .

"In that opinion (Foster v. Waco, 255 S. W. 1104 by the Supreme Court, Chief Justice Cureton) it was also said: '. . . That where a power is granted and the method of its exercise prescribed, the prescribed method excludes all others and must be followed' ". (p. 239).

The city charter of Texarkana, Texas, a statute of the state of Texas which has been in force for thirty years, limits and defines the powers of the city council. Its provisions are mandatory that a franchise must stipulate that the franchise is subject to the power and duty of regulating, controlling, and fixing rates in accordance with the statutory mandates, going so far as to say that if such express stipulation should be omitted from any franchise, it shall be considered that such stipulation is part and parcel of the franchise just as though expressly written therein. The city charter also provides that the city council shall not prescribe any rate yielding less than 10% on the actual cost of the utility plant. Sections of the city charter are set out in respondent's pleadings (R. 163-166), amongst which are the following:

Section 163:

"Said proposed franchise shall contain all the terms and agreements between the parties thereto, and it must expressly set forth that the council shall have the right and privilege . . . of fixing fares, rates. . . ." (R. 165).

Section 163-a:

"In the event that any franchise . . . shall not contain such stipulations . . . it shall nevertheless be considered that all of the stipulations contained in

Sections 162, 163 and 197 are part and parcel of the said contract and franchise, just as though written therein. . . ." (R. 165, 166).

Section 196:

"The city council shall have the power to regulate by ordinance the rates and compensation to be charged by all . . . gas . . . companies . . . ; provided that the city council shall not prescribe any rate or compensation which will yield less than ten per cent per annum on the actual cost of the physical properties, equipment and betterments. . . ." (R. 166).

Article 1119, Revised Civil Statutes of Texas of 1925, (which was *Article 1018, Revised Civil Statutes of Texas of 1911*) was originally enacted in 1907 and was the law in force at the time the original gas franchise was issued by the city of Texarkana, Texas. While *Article 1119* applies to cities incorporated under the general law, it is in the identical language of *Section 196* of the city charter of Texarkana, Texas, *supra*. This article was interpreted in the important *Uvalde Case*, *infra*, to prevent the city of Uvalde from contracting as to rates. No different construction should be given to said *Section 196* of the city charter.

The leading case in Texas on the powers of a city in Texas, is *City of Uvalde v. Uvalde Elec. & Ice Co.*, (Comm. App. 1923), 250 S. W. 140 (judgment recommended by Commission of Appeals adopted by Supreme Court of Texas). It contains full and clear discussion of the state statutes. It holds that neither the city nor the utility can contract as to rate provisions, although accepted by the utility. The *Uvalde Case* has been subse-

quently approved in a number of recent cases, including one in the Supreme Court of Texas itself, shown under section "B" of this argument.

In *San Antonio v. San Antonio Public Service Company*, 255 U. S. 547 (1921), the United States Supreme Court carefully analyzed and denied the claim that a valid contract as to rates may be made by a city having regulatory power in the state of Texas, holding that there would be such an inevitable conflict between the right to contract as to rates and the dominant power to regulate, as to render the contract inoperative and cause it to perish from the mere fact of admitting it to conflict with the authority to regulate; that the duty of a utility to charge only a reasonable rate and of the government to fix such a reasonable rate as will safeguard the rights of private ownership, are interdependent and reciprocal. This case arose upon application of the company for a rate increase which was refused by the city, on the ground that the company was bound by the franchise contract to a 5c fare. The decree enjoined the city from enforcing the alleged contract rate and from interfering with the company in substituting a 7c fare for the 5c fare. (p. 554).

In the case of *Houston v. S. W. Bell Telephone Co.* (1922), 259 U. S. 318, the court held that an agreement between a utility company and a city as to the basis for fixing rates was invalid as to either the city or the company; that such an agreement though contractual in form and though accepted and acted upon did not amount to an estoppel.

The *San Antonio* and *Houston Cases* have been frequently cited, approved, and applied in subsequent opinions.

**(1) Unlawful Abdication and Delegation
of Rate-making Function.**

The Court of Appeals did not consider it necessary however to determine what would be the result if a contract had been attempted in which the utility had agreed, in consideration of the franchise, to maintain a fixed rate. The court held that Section IX was not such a contract; that its effect was to abdicate the city's rate-making function and delegate it to the utility and the Arkansas city; that Section IX unlike the clauses in the cases on which petitioner relied, was not one merely agreeing upon a rate which the utility may charge, but was one purporting to bind the city and the utility alike by the future action of the utility and the Arkansas city, peremptorily and without action by the Texas city council (R. 431, 432); and that the city abdicated its rate-making function and refused to exercise it. (R. 432).

Petitioner attempted by means of Section IX to vest in extra-territorial authorities and bodies outside the state of Texas, the non-delegable power and duty to regulate and fix the rates to be charged in the state of Texas under the laws applicable thereto. But the city of Texarkana, Texas, may not make rates vary with and depend on conditions in another city and state having an entirely different regulatory system, and make controlling in the city of Texarkana, Texas, the rates enforced in the city of Texarkana, Arkansas. This would be equivalent to divesting the city council of Texarkana, Texas, of its lawful and sole juris-

diction, which body is charged with the inalienable duty of functioning as a rate regulatory body. It may not, by contract or otherwise, suspend, surrender, abridge, or put in abeyance its ever-present duty to regulate the rates according to law when called upon; and the council, when fixing rates may not change the rates prescribed by it, except in a lawful and authorized method and on the statutory basis. The variation of rates in Texarkana, Texas, dependent on action in another city and automatically following a zig-zag course, violates the state statutes that define the method and the basis on which rates are directed to be determined. (R. 150-154).

Moreover, there is no power vested in the city of Texarkana, Texas, to establish a conditional rate, nor a rate to be charged on a contingency or subsequent and future event, nor a rate to take effect in the present, subject to being revoked and abrogated on account of the happening of some subsequent event or condition and over which it had no control. Such a change or modification of rates is in violation of the well established rules that rates may be changed only after notice and hearing and then only in the event the facts justify the change.

The duty and authority of the city council to grant franchises and fix rates is coupled with the unconditional requirement that it must be by ordinance and that it must contain all the terms and agreements between the parties, which means that the ordinance cannot have incorporated in it some indefinite provision as to rates to perhaps become definite, when and if certain contingencies arise, or when and if something may be done by some other tribunal or

court, or which may result from an election in some other jurisdiction.

In *Nairn v. Bean* (Com. 1932), 121 Tex. 355, 48 S. W. (2) 584, the Commission of Appeal in Texas said:

"It is well settled that no governmental agency can, by contract or otherwise, suspend or surrender its functions, nor can it legally enter into any contract which will embarrass or control its legislative powers and duties or which amount to an abdication thereof." (p. 586).

This opinion was adopted by the Supreme Court of Texas (p. 586).

In *Bowers v. City of Taylor* (Com. 1929), 16 S. W. (2) 520, the Commission of Appeals in Texas said:

"The principle is well settled that a city cannot by contract or otherwise surrender its governmental or legislative functions, nor can it legally enter into any contract which will embarrass or control its legislative powers and duties or which amount to an abdication of its governmental function or of its police power." (p. 521).

The Supreme Court of Texas approved the holdings of the Commission (p. 522).

Missouri-Kansas & T. R. Co. v. Railroad Commission, (Tex. Civ. App.) 3 S. W. (2) 489 reads:

"In the state act, as pointed out above, the rate-making power is taken away from the carrier altogether and vested exclusively in the commission." (p. 495).

"The holding of the commission that the Wichita Falls rates, though approved by it, were in fact

made by the carriers, because made upon their application is unsound. Rates, to be effective under the Texas act, must be made by the commission, and are inoperative other than by force of its orders." (p. 496).

The decision in this case was affirmed by the Supreme Court of Texas. (13 S. W. (2) 679, 682).

In Texarkana, Texas, the power to make gas rates is likewise taken away from the respondent "altogether", and vested in the city council "exclusively". When rates are made it is the city that must make them in accordance with the statutory power,—there being no power given to the city or the utility to contract, surrender, delimit, qualify, restrict, suspend, barter away, abdicate, or delegate the regulatory power.

Also see *Horne Zoological Arena Co. v. City of Dallas* (Civ. App. 1932), 45 S. W. (2) 714; *Green v. San Antonio Water Supply Co.* (Civ. App. 1917), 193 S. W. 453; *City of Corpus Christi v. Central Wharf* (Civ. App.), 27 S. W. 803; 30 Texas Juris, pp.115, 116, 117, paragraph 56; Cooley's Constitutional Limitations, Vol. 1, 234 and 437; Dillon on Municipal Corporations, Vol. 1, page 460, paragraph 244.

(2) Asserted Discrimination; Prescribed Rates Incontrovertible Except for Change in Due Course for the Future.

The respondent utility serves approximately 200 cities, towns, and communities on its system, and its problems in maintaining high standards of service and in charging a fair price for its services are not confined only to

Texarkana, Texas. The unit for rate-making is the city, no matter how many towns are served; and each city must stand on its own feet. *Wabash Valley Elec. Co. v. Young*, 287 U. S. 488. The "public" that the respondent utility is serving is the whole body of customers in the 200 cities and towns on its whole system.

The case of *Texas Gas Utilities Co. v. City of Uvalde* (Tex. Civ. App. 1934), 77 S. W. (2) 750, reads:

"Article 6057 expressly provides that different rates may be charged in different places." (P. 751). (Italics ours).

As between Texarkana, Texas, and Texarkana, Arkansas, during the course of the litigation, the difference in rates has favored Texarkana, Texas. While for two and one-half months the rates in Texarkana, Texas, were somewhat higher than those in Texarkana, Arkansas, the rates in Texarkana, Texas, were considerably lower than those in Texarkana, Arkansas, for a period of nearly three years. Not on the merits or reasonableness of the rates, but on technicalities as to procedure in litigation in Arkansas, respondent temporarily charged in Texarkana, Arkansas, rates which were somewhat lower than those which are set out in Section V of the ordinance of June 13, 1930, but this situation lasted for only two and one-half months from December 1, 1933 to February 16, 1934. On the latter date a temporary injunction was issued as soon as legal procedure would permit, and new rates were

placed into effect in Texarkana, Arkansas, which were higher than the Section V rates in Texarkana, Texas. These new rates continued in effect in Texarkana, Arkansas, from February 16, 1934 to December 4, 1936, nearly three years. The litigation in Arkansas is still unsettled. The city of Texarkana, Texas, admitted:

"If the gas company is successful in its Arkansas suit, then there will have been no discrimination from and after February 16, 1934". (R. 154).

On the other hand, if respondent should lose its appeal in Arkansas, and the city of Texarkana, Texas, should recover what it prayed for in this case, *the rates prescribed in Texarkana, Texas, in Section V of the ordinance of June 13, 1930 would be abrogated ab initio, without ever having had any operative force whatever*, and the city could go back to 1930 and uproot the rate schedule from its very date and recover reparations for the past eight years. This is in violation of the rule in Texas that no reparations are recoverable where a utility is acting under a rate duly approved by the appointed regulatory body, the rates prescribed by a tribunal vested with regulatory power being *incontrovertible* until set aside in due course for the future. *Producers' Refg. Co. v. Missouri-Kansas & T. R. Co.* (Tex. Com. App.), 13 S. W. (2) 678, at 681, 682. And differences in rates are not sufficient to upset the prescribed schedule. *Idem.* As recommended by the Commission of Appeals, the Supreme Court of Texas affirmed the judgment of the Court of Civil Appeals. (p. 682).

It is also well settled that the statutes of the State of Texas deprive "railroad companies of the power to make

rates and confers that authority upon the commission". *Railroad Commission v. Weld & Neville*, (Texas Supreme Court), 96 Tex. 405, 73 S. W., 529, 532, per Justice Brown.

Differences in values, expenses, taxes, governmental relations, operating conditions in two cities will cause a wide difference in rates. Enumeration of the differences between the two towns of Texarkana, Texas, and Texarkana, Arkansas, is set out at R. 153. This subject is discussed in *Smythe v. Ames*, 169 U. S. 466, 540; *Mitchell C. & C. Co. v. P. R. R. Co.*, 230 U. S. 247, 255, 256; *Penna. R. Co. v. International Coal Min. Co.*, 230 U. S. 184, 200.

B.

The Court of Appeals in Deciding Section IX to be Invalid Has Not Decided an Important Question of Local Law in a Way Probably in Conflict with Applicable Local Law.

The Court of Appeals in deciding that said Section IX was invalid did not decide an important question of local law in a way probably in conflict with applicable local decisions.

The Court said:

"Whatever might be said for the city's side of the case, if, as it assumes, the contract were in effect one in which the utility had agreed, in consideration of the franchise to maintain a fixed rate, we think it perfectly plain that the cause in question is not such a contract." (R. 431).

This decision is not in conflict with *Dallas Ry. Co. v. Geller* (1925), 114 Tex. 484, 271 S. W. 1106, in which the plain-

tiff was held not entitled to an injunction preventing the utility from raising its rates above the alleged contractual rate designated as the maximum fare under the utility's franchise.

Petitioner cites the *Geller Case* as authority for the proposition that a utility may be bound by contract to a fixed franchise rate where the city cannot itself be bound. We do not agree that such is the holding of the *Geller Case*, neither do we believe such a holding can be found in the Texas jurisprudence. However, if it should be conceded for argument only that such a rule should exist, it does not conflict with the Court of Appeals opinion in this case.

Even a casual reading of the opinion of the Court of Appeals will disclose that the real basis of the decision is the proposition that a Texas city having rate regulatory duties cannot abdicate and abandon such duties as was attempted in Section IX; neither can it delegate such duties to the utility or some other city governing body. None of these matters is remotely involved in the *Geller Case*.

Petitioner, however, in effect contends that the *Geller Case* conflicts with *Uvalde v. Uvalde Electric & Ice Co.* (1923), 250 S. W. 140, (judgment recommended by the Commission adopted and entered as the judgment of the Supreme Court of Texas, p. 142), and that the decision of the Court of Appeals is in conflict with the *Geller Case*. The Court of Appeals did not consider that there was any such conflict.

Petitioner does not even contend that the decision here is in conflict with *San Antonio v. San Antonio Public*

Service Company, 255 U. S. 547 (1921), *Houston v. S. W. Bell Telephone Co.* (1922), 259 U. S. 318.

The *Geller Case* has only been cited once in a subsequent case in Texas, and then relating to a question of referendum not involved in the case at bar. *Denman & Quin* (1938, Tex. Civ. App.) 116 S. W. (2) 783 at 786 (Advance Sheets).

As shown below, the *Uvalde Case* has been frequently and recently approved and quoted by the Texas courts. In this connection we direct attention to the weight to be given to the opinion of the Commission of Appeals. The Supreme Court of Texas, in July, 1935, in *National Bank of Commerce v. Williams* (Supreme Court of Texas) 125 Tex. 619, 84 S. W. (2) 691, 692, said:

"Finally, we wish to say that the Supreme Court is now adopting all opinions of the Commission as the opinions of the court itself. These adopted opinions are given the same force, weight, and effect as the opinions written by the members of the Supreme Court itself. There are, however, a great many opinions of the commission which appear in the Southwestern Reporter that were not adopted or approved by the Supreme Court. These opinions are not binding on the court in the same sense that the approved and adopted opinions are, but they are given great weight by us, and the courts of civil appeals and all lower courts should feel constrained to follow them, until they are overruled by the Supreme Court."

The *Uvalde Case* and the *Geller Case* were under consideration at the same time in the Supreme Court of Texas (p. 27 of petitioner's brief) and no criticism or qualification in any case whatever has been made of the

Uvalde Case. It is clear that it was not overruled by the *Geller Case* or by any other case.

The Supreme Court of Texas, in the case of *Lower Colorado River Authority v. McCraw, Attorney General of Texas*, (1935) 125 Tex. 268; 83 S. W. (2) 629, recognized the principles of the *Uvalde Case* as being well established:

"It is well established in this state that the Legislature may, by express words, authorize municipal corporations to enter into contracts, prescribing the rates that may be charged by public utility corporations for a definite time. *City of Uvalde v. Uvalde Electric & Ice Co.* (Tex. Com. App.) 250 S. W. 140, and numerous authorities there cited. Of course, such right does not exist unless the legislative authority therefor is clear and unmistakable. *Id.*"

In *Texas-Louisiana Power Co. v. Farmersville* (1933), 67 S. W. (2) 235, the Commission of Appeals (judgment recommended adopted by the Supreme Court of Texas, p. 240) cited the *Uvalde Case* as definitely setting a rule in Texas (p. 239). This opinion was by Mr. Justice Sharp, now on the Supreme Court of Texas.

In *Southern Prison Co. v. Rennels* (1937), 110 S. W. (2) 606, at 609, the Court of Civil Appeals cited the *Uvalde Case*, and also the case of *Texas Gas Utilities Co. v. City of Uvalde*, 77 S. W. (2) 750, quoted below.

In *City of Ft. Worth v. George* (1937), 108 S. W. (2) 929, the Court of Civil Appeals quoted excerpts of the *Uvalde Case*.

In the case of *Texas Gas Utilities Co. v. City of Uvalde* (1934) 77 S. W. (2) 750, the Court of Civil Appeals

cited *City of Uvalde, et al., v. Uvalde Electric & Ice Co.* (Tex. Com. Appl.) 250 S. W. 140; *Railroad Commission of California v. Los Angeles Ry. Corp.*, 280 U. S. 145, and said:

"The power to fix rates is absolutely inconsistent with the power to contract for rates, and the city of Uvalde cannot possibly enter into a valid contract for rates, but rates therein must be controlled by the city's rate-fixing power." (p. 752).

Judge Hutchinson, the organ of the court below, is a Texas lawyer, a distinguished member of the bar of that state prior to his elevation to the bench, thoroughly versed in and familiar with the jurisprudence of that state. The opinion purports not to depart from the local law of Texas but to exactly follow and be ruled thereby. It is not likely that it did not achieve its avowed purpose or that it so signally failed in its statement and construction of the applicable Texas decision. It is much more likely that counsel for the petitioner in the zeal of the advocate is mistaken in stating that the court below neither correctly construed nor followed the local law.

C.

The Court of Appeals Did Not Decide an Important Question of General Law in a Way Probably Untenable. The Proposition Urged by Petitioner is Opposed to the Great Weight of Authority. But No Question of General Law is Involved.

If the question were one of general law, which patently it is not, the decision of the Court of Appeals is supported by the weight of authority. *Southern Iowa Elec.*

Co. v. Chariton, (Iowa 1921), 255 U. S. 539; *Ortega Co. v. Triay*, (Florida 1922), 260 U. S. 103; *Railroad Com. v. Los Angeles Ry. Corp.* (California 1929), 280 U. S. 145; *San Antonio v. San Antonio Public Service Company*, (Texas 1921), 255 U. S. 547; *Houston v. S. W. Bell Telephone Co.* (Texas 1922), 259 U. S. 318.

It might be pointed out that there was no holding in the case of *Knoxville v. Knoxville Water Co.*, 189 U. S. 434, that the utility bound itself by contract to a maximum fare. That question was not involved. The company had not applied to increase the rates, but was insisting that both the company and the city were bound to the rates as a contract. The holding was that the rate contract was not valid and did not prevent a reduction in rates by the city having regulatory power and that the company took its charter subject to that power.

It is submitted that the local laws of Texas as found in the statutes and decisions in that state are controlling and that no principle or question of General Law is involved.

D.

Section IX is Inapplicable, Its Conditions Not Fulfilled. No Conflict Claimed.

The construction of Section IX of the ordinance is of local importance only and, if enforceable, is without application under the facts and circumstances of the case.

Section IX, if it should be held to be valid or capable of application under any circumstances, is not applicable to the case. The condition of Section IX has not been fulfilled. The condition or effective date set out in Section IX is not to be prior to such time as grantee may have been finally compelled to place into effect in the city of Texarkana, Arkansas, less rates than those prescribed in Section V of the ordinance of June 13, 1930 in Texarkana, Texas. Only on that condition and only at such time could Section IX apply, even if it were valid. "Then and thereupon, the lessened rate shall apply. . . ." This is purely future. Petitioner admits that the contest over the Arkansas rates is not finally settled. Respondent did not voluntarily change its rates in Texarkana, Arkansas, but the city contends that respondent was finally compelled to do so, which is denied by respondent and confessed by petitioner's motion to dismiss.

For a period of nearly three years the rates were higher in Texarkana, Arkansas, than in Texarkana, Texas, although the rates were temporarily somewhat lower in Texarkana, Arkansas, than in Texarkana, Texas, for the short space of two and one-half months required for preparing and filing a new suit. The previous suit was dismissed not on the merits of the rates but on technicalities of procedure. This short period ended on February 16, 1934, when higher rates were placed into effect in Texarkana, Arkansas, and continued for nearly three years and the litigation for that period and subsequent periods is not yet finished, but is still pending.

This does not amount to a final settlement of the rates in Texarkana, Arkansas, nor to a final compulsion, nor to the fulfillment of the condition of Section IX.

CONCLUSION.

It is, therefore, respectfully submitted that the petition for writ of certiorari be denied.

Respectfully submitted,

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Counsel for Respondent.

September 12, 1938.

APPENDIX

ARTICLE 1119 REV. CIVIL STATUTES.

Article 1119 Rev. Civil Statutes of Texas enacted in 1907 remained in full force and effect from 1907 until amended in 1937. The amended Article of 1937 is not relevant to this case. We therefore set out the original article.

Article 1119.

Art. 1119. (1018) Rates prescribed, etc.—The governing body of all cities and towns in this State of over two thousand population, incorporated under the general laws thereof, shall have the power to regulate, by ordinance, the rates and compensation to be charged by all water, gas, light and sewer companies, corporations or persons using the streets and public grounds of said city or town, and engaged in furnishing water, gas, light or sewerage service to the public, and also to prescribe rules and regulations under which such commodities shall be furnished, and service rendered, and to fix penalties to enforce such charges, rules and regulations. The governing body shall not prescribe any rate or compensation which will yield less than ten per cent per annum net on the actual cost of the physical properties, equipment and betterments. (Acts 1907, p. 217, par. 1).

The amendatory act 1931, 42nd Leg., p. 380, ch. 226, par. 1, was held invalid in *Texas-Louisiana Power Co. v. City of Farmersville* (Com. App.) 67 S. W. (2d) 235, rev'g (Civ. App.) 55 S. W. (2d) 195, leaving original act in full force and effect.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 294

CITY OF TEXARKANA, TEXAS,

Petitioner,

versus

ARKANSAS LOUISIANA GAS COMPANY,

Respondent.

**On Writ of Certiorari to the United States Circuit Court
of Appeals for Fifth Circuit.**

**BRIEF FOR RESPONDENT, ARKANSAS LOUISIANA
GAS COMPANY.**

**HENRY C. WALKER, JR.,
WILLIAM C. FITZHUGH,
WILLIAM H. ARNOLD, JR.,**

Counsel for Arkansas Louisiana Gas Company.

December 3, 1938.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 294

CITY OF TEXARKANA, TEXAS,
versus

ARKANSAS LOUISIANA GAS COMPANY,
Respondent.

On Writ of Certiorari to the United States Circuit Court
of Appeals for Fifth Circuit.

**BRIEF FOR RESPONDENT, ARKANSAS LOUISIANA
GAS COMPANY.**

Preliminary.

As petitioner's brief contains certain inaccuracies and does not adequately state the case, it is necessary that respondent present a statement of the case.

Petitioner states at page 4 that Texarkana Texas, and Texarkana, Arkansas, are physically one community and that the respondent has one gas distribution plant

which serves both cities. These assertions are not to be taken as the facts in this case. Respondent denied that said cities were one community, (R. 132, 133)*; denied that the consumers in Texarkana, Arkansas, are served from the same mains as the consumers in Texarkana, Texas, R. 133, alleged that the laws applicable to each city were materially different and that few conditions were the same (R. 153). These allegations are to be taken as setting out the facts, as they were confessed by petitioner's motion to strike out.

Petitioner at page 4 states that for the entire period covered by this suit, respondent has been compelled to extend to its consumers in Texarkana, Arkansas, service at rates less than the rates granted in the Texas ordinance and collected by respondent from Texas consumers. This statement is much too wide. The rates from June 1930 to December 1, 1933, with certain exceptions, were the same in both cities. While during a short interim period of two and one-half months from December 1, 1933, to February 16, 1934, the rates in Texarkana, Arkansas, were temporarily somewhat lower than in Texarkana, Texas, it should be borne in mind that lower rates were collected in Texarkana, Texas, than in Texarkana, Arkansas, from February 16, 1934 to December 4, 1936, nearly three years.

Respondent states that the rates in the ordinance of June 13, 1930, are recited to be determined by compromise agreement. The facts are fully stated at R. 124, 125,

*Footnote: References to the record herein are to the printed pages of the original transcript certified to this court. As the record is being reprinted, the page numbers of the reprint are not yet available.

and are confessed by petitioner's motion to strike out. Section V reads:

"A hearing as to the rates which shall be charged by the Grantee having been had, and the Grantee having waived any right to notice of the fixing of such rates, the rates to be charged by the Grantee for natural gas furnished under the provisions of this ordinance are hereby determined and fixed by compromise agreement, said rates are as follows, to-wit. . . ." (R. 13).

Petitioner at page 18 attempts to make a point regarding bond in the Railroad Commission, but in view of the clear facts, R. 178-180, it is submitted there is no substance to it, as hereinafter more specifically shown. The reference, R. 367, given by petitioner refers to answer and counterclaim filed July 12, 1934, whereas this was amended by respondent's Separate Amended Answer and Counterclaim filed July 14, 1937, R. 122-225, see specifically R. 161, 178, 179, 180, 183, 184. The latest pleadings clearly governs. But petitioner's brief in this court fails on this point to give the amended allegations which are confessed by petitioner's motion to strike out filed July 19, 1937, R. 228-231, on which final decree was rendered in the trial court.

STATEMENT OF THE CASE.

The decree in the district court was rendered solely upon the pleadings filed by the plaintiff, city of Texarkana, Texas, petitioner in this court. This resulted from the fact that the district court, on petitioner's motion, struck out the pleadings of Arkansas Louisiana Gas Company, defendant in the trial court and respondent in this court, on the

ground that they were as a matter of law insufficient as either answers or counterclaims. (R. 232). Respondent declined to plead over, and the court rendered final decree. No opinion was rendered by the district court. Upon appeal and cross-appeal, the Court of Appeals reversed the decree and remanded the case with directions to dismiss petitioner's bill, R. 423-432, *Arkansas Louisiana Gas Company v. City of Texarkana, Texas*, 97 F. (2) 5-10.

The name of the respondent in the district court, which was Southern Cities Distributing Company at the time suit was filed, was changed to Arkansas Louisiana Gas Company by amendment to the articles of incorporation on November 27, 1934. (R. 100-103, 403).

This case involves the natural gas franchise that was granted respondent on June 13, 1930, in the city of Texarkana, Texas. The history of the Texarkana, Texas, gas plant is that on December 6, 1905, a 25-year gas franchise was granted to Citizen's Oil & Pipe Line Company (R. 64), and that on March 13, 1923, an ordinance was passed by the city council of Texarkana, Texas, modifying the rates to be charged (R. 63-67), and that in 1928 respondent purchased the franchise and plant. (R. 123).

As the gas supply at Texarkana and other cities served by respondent was insufficient and inadequate, it was necessary for respondent, at very substantial expense, to construct a 20-inch transmission system for about 175 miles to the Monroe-Richland gas fields in Louisiana, and make other extensions. After these constructions were made, respondent attempted to get an increase in the gas rates in both Texarkana, Texas, and Texarkana, Arkansas.

The situation in the latter city will be discussed presently. Respondent in the first part of 1930 filed application for increased rates in the city of Texarkana, Texas, the existing rates being those set out in the above mentioned ordinance of March 13, 1923. The city council held several hearings as to the merits of the rates applied for by respondent to be charged in that city, but respondent's application was denied by the city council and respondent appealed to the railroad commission of Texas. The railroad commission came to Texarkana and conducted hearings upon the appeal. In the course of the hearings, petitioner decided to grant a somewhat increased rate schedule of rates, whereupon new proceedings were opened in the city council and further hearings were had in city council, which resulted in the city council's prescribing the schedule of rates set out in Section V of the franchise ordinance of June 13, 1930. These rates were lower than those that had been applied for by petitioner but somewhat higher than the existing rates. The railroad commission approved the new rates and dismissed the appeal pending before it, R. 124, 125. The ordinance, which embodied the prescribed rates, was subsequently, on June 17, 1930, accepted by respondent. (R. 10-19). The rates set forth in said Section V of said ordinance of June 13, 1930, were placed into effect in the city of Texarkana, Texas, and have been maintained at all times continuously from that time to the present time.

Three of the sections of said ordinance are involved in this case, Sections V, VIII-A, and IX. Section V sets out the prescribed rates and shows that they were determined and fixed by the city council of Texarkana, Texas,

after a hearing as to the rates which should be charged had been had. Section VIII-A provides that the city council of said city shall not apply for a reduction in rates nor respondent for an increase except upon a year's notice. Section IX provides that if respondent shall be finally compelled to, or should voluntarily, place into effect in the City of Texarkana, Arkansas, less rates than those prescribed in said Section V, then and thereupon the lessened rates shall apply in the city of Texarkana, Texas. (R. 18).

As the suit of the city of Texarkana, Texas, is based mainly upon the proposition that the rates in the city of Texarkana, Texas, are governed and controlled by rates in the city of Texarkana, Arkansas, the situation in Arkansas will be set out before stating the details as to Texarkana, Texas. However, respondent pleaded and will undertake to demonstrate in the argument that the rates in Texarkana, Texas, are governed, not by the rates in Arkansas, but solely by Section V of the ordinance of June 13, 1930, passed by the city council of Texarkana, Texas, under its regulatory powers defined and set out in the statutes of the state of Texas.

Events in Texarkana, Arkansas.

The city of Texarkana, Arkansas, is an entirely distinct municipality from the city of Texarkana, Texas. The former is located in the state of Arkansas and the latter in the state of Texas. The laws and the facts applicable to each city and state are significantly different in many substantial respects. In 1921 the gas franchise that had existed in Texarkana, Arkansas, was surrendered and in lieu

thereof an indeterminate permit was granted by the corporation commission of the state of Arkansas.

On May 8, 1923, the city council of Texarkana, Arkansas, passed a resolution modifying the rates to be charged in said city (R. 216-225). This resolution is materially different in certain respects from the Texarkana, Texas, ordinance of March 13, 1923, set out at R. 64-67; there is no provision in said Texarkana, Texas, ordinance similar to the payments required in Article E of said Arkansas resolution. (R. 224). In 1928 respondent purchased the gas permit and plant in Texarkana, Arkansas.

On May 30, 1930, the city council of Texarkana, Arkansas, passed a resolution fixing rates for that city that were somewhat higher than the aforesaid rates of May 8, 1923, and the new rates were put into effect in Texarkana, Arkansas. Subsequent to June 1930, a referendum petition was filed in the city council of Texarkana, Arkansas, for the purpose of securing an election and vote upon said resolution of May 30, 1930, under the referendum provisions of the Constitution of the State of Arkansas. (R. 185). The city council denied said referendum petition and refused to submit the rates to public vote because it did not consider that rate making was a proper subject matter to be reviewed in a general vote under the referendum laws. Nothing further was done regarding the referendum petition until 1931, when a suit was filed in the state court in Arkansas by B. E. Carter for mandamus to require an election upon said resolution of May 30, 1930. The court after trial held that election was required and issued mandamus for that purpose. Appeal to the Supreme Court of Arkansas and then to the United States Supreme

Court resulted in affirmance. *Southern Cities Distributing Co. v. Carter*, 184 Ark. 4, 41 S. W. (2) 1085, 285 U. S. 525, 526.

By the time this procedure was completed, considerable time had elapsed and, on the election being held and the voters being told that by going against the resolution they could secure some \$60,000.00 in refunds, they naturally lost no time in abrogating the resolution. Respondent then filed suit in the federal court in Arkansas for the purpose of protecting the rates of May 30, 1930, and of enjoining the previous rates of May 8, 1923, on the ground of confiscation. Temporary injunction was secured in the district court, but the city of Texarkana, Arkansas, appealed and secured reversal of the case in the Eighth Circuit, *City of Texarkana, Arkansas, v. Southern Cities Distributing Co.*, 64 F. (2) 944. The court on rehearing struck out a statement in its original opinion regarding a contract as to rates in Arkansas, and held that the election had revoked the resolution of May 30, 1930, and the rates therein set out, and as a result, the previously existing rates of May 8, 1923, in Texarkana, Arkansas, continued as the rates in that city; and ordered the suit to be dismissed, not on the merits of said rates of May 8, 1923, or of those of May 30, 1930, but on the ground that there had been no prior attempt to gain administrative relief therefrom by any method proper for such purpose. On return of the mandate the district court in Arkansas on December 1, 1933, adjudged refunds for the period from May 30, 1930, to December 1, 1933, in the sum of \$60,000.00, based on the said rates of May 8, 1923, and dismissed the company's bill without prejudice to new suit.

From December 1, 1933, to February 16, 1934, the rates charged in Texarkana, Arkansas, were the said rates of May 8, 1923, and this short temporary period of two and one-half months represents the unavoidable delay that occurred between the date of rendition of the said decree of December 1, 1933, and the date a temporary injunction was issued against the said rates of May 8, 1923, in a new suit that was filed as soon as legal procedure would permit. (The decree of the district court in the instant case adjudged petitioner reparations over this period of time, from December 1, 1933, to February 16, 1934, under Section IX of the ordinance of June 13, 1930).

This new suit in Arkansas contributes its share of complications, but it is not thought necessary to state its history except briefly: On October 23, 1933, respondent filed with the city council of Texarkana, Arkansas, an application for increased rates. (R. 20). On November 14, 1933, the city of Texarkana, Arkansas, served notice on respondent that the city council would consider reducing the rates to 40c per m.c.f. (R. 185). On December 22, 1933, the city council of Texarkana, Arkansas, after hearing, denied respondent's application for change in rates and found that the rates of May 8, 1923, were the legal rates and that they were sufficient. (R. 187). Respondent prepared suit to enjoin the said rates of May 8, 1923, and on February 9, 1934, notified the city that it would on February 16, 1934, apply to the federal court for temporary injunction, (R. 188), but in the meantime the city council of Texarkana, Arkansas, on February 13, 1934, passed a resolution prescribing 40c rates, which were lower than the existing rate (R. 187).

On February 16, 1934, the federal court temporarily enjoined the city of Texarkana, Arkansas, from enforcing either the said rates of May 8, 1923, or the said 40c rate of February 16, 1934, and from interfering with respondent in charging the rates applied for by respondent in the city council of Texarkana, Arkansas, on October 23, 1933. These increased rates were then put into effect in Arkansas and charged from February 16, 1934, to December 4, 1936. (R. 154). On December 4, 1936, the court on final hearing made permanent the injunction against the said rates of February 13, 1934, but dissolved the injunction as to the rates of May 8, 1923, and rendered judgment on the injunction bond for reparations based on said rates of May 8, 1923, (R. 144, 145). *Arkansas Louisiana Gas Co. v. City of Texarkana, Arkansas*, 17 F. Supp. 447. This decree was superseded by bond when respondent on December 16, 1933, took appeal to the Court of Appeals for the Eighth Circuit, but injunction as against said rates of May 8, 1923, pending the appeal was denied (R. 119-121). The appeal was still pending at the time of final decree in the case at bar and the litigation had not terminated. Petitioner in its brief sets out that the appeal in Arkansas resulted in affirmance on April 13, 1938, *Arkansas Louisiana Gas Co. v. City of Texarkana, Arkansas*, 96 Fed. (2) 179 (8th C. C. A.) and that certiorari was denied on October 10, 1938, Case No. 72, Advance Sheets, 83 L. Ed. 13, Pamphlet No. 1, but these facts can not affect the case at bar as they were not and could not have been pleaded nor included in the record, and therefore can not affect the case at bar as it must be tried on the record and the pleadings in the district court.

Statement as to Texarkana, Texas.

The present suit was filed by petitioner on November 16, 1933, in the district court of Bowie County, Texas, and removed by respondent to the federal court on December 20, 1933. Petitioner pleaded Section IX of the ordinance enacted on June 13, 1930, by the city council of Texarkana, Texas, and petitioner's interpretation thereof; that respondent refused to comply therewith; that respondent on November 3, 1933, had violated Section VIII-A of said ordinance of June 13, 1930, by filing application for increased rates in Texarkana, Texas; and petitioner prayed for specific performance, reduced rates for the future and retroactive reparations. Respondent answered and counterclaimed that Section VIII-A and Section IX were invalid, and set out that the rates prescribed in Section V of the ordinance of June 13, 1930, were the existing rates, but that they, or any less rates, were confiscatory and that respondent had exhausted the administrative remedies without avail and was entitled to disregard them and to increase its rates.

Petitioner on May 22, 1934, dismissed its pending suit, R. 409, and on the next day, May 23, 1934, filed the same suit over in a new proceeding in the district court of Bowie County, Texas, which was removed to the federal court. On the court holding that the dismissal of petitioner's petition in the first suit did not include dismissal of respondent's counterclaim, petitioner secured an order re-instating its suit previously dismissed, R. 410, and consolidated the first and second suits, R. 409-412.

Both sides amended in the consolidated suits. Petitioner filed motion to strike out the answers and counter-

claims. The district court sustained petitioner's motion and struck out respondent's pleadings in both cases on the ground that they were insufficient either as answers or counterclaims. (R. 232). Respondent declining to plead over, the court solely on petitioner's pleadings found that during the period from December 1, 1933, to February 16, 1934, respondent collected from its consumers in Texarkana, Arkansas, a rate less than that charged in said two and one-half months period in Texarkana, Texas, and adjudged reparations for the gas consumers in Texarkana, Texas, for said period. (R. 234).

The main issue pleaded by petitioner was that Section IX of the ordinance of June 13, 1930, was valid, that it upset and abrogated the prescribed schedule of rates set out in Section V of said ordinance, and should be construed to require reparations retroactively from June 13, 1930, and to require reduced rates prospectively.

The principal claims of respondent were that the rates prescribed in Section V of the ordinance of June 13, 1930, were paramount and controlling; that Section IX was invalid; that even if it should be held to be valid, its conditions had not been fulfilled; that respondent was entitled to relief from the existing rates because the administrative remedy had been exhausted and the rates were confiscatory; that respondent was entitled to a judicial hearing on confiscation in defense to petitioner's suit as well as by way of counterclaim.

As there are many facts to be considered, it will be helpful to give a chronological statement.

CHRONOLOGICAL STATEMENT.

The ordinance of June 13, 1930, passed by the city council of Texarkana, Texas, which has been briefly described, contains the following:

Section V.

"Section V. A hearing as to the rates which shall be charged by the Grantee having been had, and the Grantee having waived any right to notice of the fixing of such rates, the rates to be charged by the Grantee for natural gas furnished under the provisions of this ordinance are hereby determined and fixed by compromise agreement, said rates are as follows, to-wit:

Domestic and Commercial Rate.

(a) For the first one thousand (1000) cubic feet per meter of gas or fraction thereof sold to any domestic or commercial consumer during any one month—\$1.00 per thousand cubic feet. Said charge shall also be made regardless of whether any gas is consumed or not.

(b) For the next one hundred and forty-nine thousand (149,000) cubic feet of gas or fraction thereof sold to any domestic or commercial consumer during any one calendar month—\$.50 per thousand cubic feet. All gas sold at \$.50 per thousand cubic feet is subject to 5% discount if paid within ten (10) days after bill is rendered.

(c) For all gas sold to any one domestic or commercial consumer during any one calendar month in excess of one hundred and fifty thousand (150,000) cubic feet—\$.25 per thousand cubic feet. All gas sold at \$.25 per thousand cubic feet is subject to \$.02 per thousand cubic feet discount if paid within ten days after bill is rendered.

A charge of \$1.00 shall be made for each connect or disconnect, after first installation, that is made

for the same consumer, at the same address, except where meter is removed to be replaced, repaired or for inspection.

Churches, schools or colleges maintained by State, County or City; schools or colleges maintained by any religious organization; public hospital shall be allowed a gross discount of 40% from the gross rate for domestic and commercial gas when bills are paid within ten days after being rendered. Municipal buildings shall be allowed free gas for all gas used in conducting the city's business. (R. 13, 14). Then follows the industrial rate (R. 15, 16).

Section VIII-A.

Section VIII-A. In consideration of the granting of this franchise, it is mutually agreed and understood by and between the parties hereto that before the city council of said city shall apply for a reduction in rates, or before the Southern Cities Distributing Company, its successors or assigns, shall make application for an increase in rates, either party shall give to the other party one year's notice in writing of its intention to so apply for an increase or decrease in rates, and no application for increase or decrease in rates shall be acted upon or considered unless said one year's notice is first given before making such application. (R. 17, 18).

Section IX.

Section IX. If Grantee shall be finally compelled to, or should voluntarily, place in any rates in the city of Texarkana, Arkansas, less than the rates granted by this ordinance then and thereupon the lessened rate shall apply to the city of Texarkana, Texas, and Grantee shall not be authorized or permitted to charge and collect any higher rate. (R. 18).

The acceptance by respondent of said Ordinance reads as follows:

The Southern Cities Distributing Company does hereby accept the Ordinance, with its terms and provisions, finally adopted by the City Council of Texarkana, Texas, on the 13th day of June, 1930.

In testimony thereof, witness the signature and seal of said Southern Cities Distributing Company on this, the 17th day of June, A. D. 1930. (R. 19).

The rates set forth in the above Section V were placed into effect in the city of Texarkana, Texas, and have been maintained at all times continuously from that time to the present time.

On November 3, 1933, respondent filed with the city council of Texarkana, Texas, application for change and modification of rates (R. 19-26), stating that the existing gas rates were insufficient to pay operating expenses, depreciation, or return, and confiscatory, and proposing a sliding scale of rates, higher on the first 10,000 cu. ft. but considerably lower on the gas over 10,000 cu. ft., to-wit:

First	1000 cu. ft.	\$1.75
Next	2000 cu. ft.	.75
Next	7000 cu. ft.	.55
Over	10000 cu. ft.	.35;

setting out that net losses, which had been and were being suffered under the rates in force since June, 1930, amounted to confiscation (R. 25). On November 9, 1933, respondent filed in the city council motion for prompt hearing together with affidavits. (R. 209-216). On November 10, 1933, the city council of Texarkana, Texas, passed a resolution directing the city attorney to use all available

means in law and in equity to prevent any increase in rates until such time as the council might deem that a change in rates should be justified. (R. 172).

On November 14, 1933, respondent appeared in the city council by its attorneys and witnesses and requested permission to introduce its evidence. (R. 172). The council refused this and passed a resolution pointing out that there were no provisions in the state statutes which would authorize the council to place new and increased rates promptly into effect; and ordered respondent not to put the rates into effect pending hearing of the application, but set out that the council was willing, if proper information were submitted, to consider the question whether it would waive Section VIII-A of the franchise providing for one-year notice. (R. 173, 174).

On November 16, 1933, petitioner filed suit in the district court of Bowie County, Texas, alleging that by the franchise ordinance of June 13, 1930, respondent was bound

"to supply gas at the rates granted and established therein. Said portion of said franchise granting such rates is contained in Section V of said ordinance," (R. 5);

that respondent, in violation of the one-year provision of Section VIII-A of said ordinance (R. 5), filed with the city council on November 3, 1933, a notice and application for change and modification of rates; that respondent filed another notice on November 4, 1933 (R. 7); and prayed that respondent be enjoined from putting into effect the proposed schedule at any time or in any manner, except upon one-year notice and after pursuing the remedies pro-

vided by law (R. 9). On the same day that suit was filed, petitioner obtained a temporary injunction without notice to defendant (R. 27).

Respondent continued diligently to prosecute its application in the city council, and appeared by attorneys and witnesses before the council on November 28, 1933 (R. 176).

On December 12, 1933, the city council of Texarkana, Texas, passed a resolution referring to Section IX of the ordinance of June 13, 1930, and to a decree of December 1, 1933, rendered in Arkansas, and directed the city attorney to call upon respondent to comply with the city's construction of Section IX as a contract as to rates and to make reparations to all its consumers in Texarkana, Texas, based on Arkansas rates, and to put the Arkansas rates into effect in Texarkana, Texas, and in the event of refusal, to file suit to compel it to do so (R. 177). Said resolution was passed in the absence of respondent and without notice or hearing, in only one reading, without publication, and in violation of other requirements of the law governing the exercise of the regulatory power by the city council as set out at R. 178 and in the appendix to this brief. The city admitted that the resolution was not passed under the powers conferred on the council, as a rate regulating tribunal, but was simply the action of one party, calling upon the other party to carry out a contract and directing that suit be brought to enforce it if such other party refused (R. 178); that the resolution did not purport to be a rate order of a regulatory body (R. 179), and was not subject to appeal to the Railroad Commission under Article 6058, Revised Statutes of Texas (R. 179). In view

of this position of the city, there can be no issue in this court concerning it, as it is conceded by the city that it is not operative or valid as a rate regulatory order. See also R. 160, 180, 183, 184.

The suit filed by petitioner was removed to the federal court and respondent on December 20, 1933, filed answer and counterclaim alleging, that it was pursuing the proper remedies, that Section VIII-A was invalid, that respondent had done everything possible to get relief from daily confiscatory losses and would have no remedy for what it had lost and would lose, and prayed for dissolution of the temporary injunction, cancellation of Section VIII-A, and general relief. (R. 37-44).

On December 27, 1933, and January 2, 1934, the city council of Texarkana, Texas, postponed hearing respondent's application for change in rates, although respondent was at all times pressing for relief. (R. 181).

On January 15, 1934, petitioner filed amended petition in the federal court alleging, that the application of respondent for change in rates was in violation of Section VIII-A of the ordinance of June 13, 1930; that the respondent had the power to waive, and did waive, any right granted it by the Statutes of Texas to obtain increased rates upon a hearing after sixty days' notice, or upon a hearing before the Texas Railroad Commission; that, if Section VIII-A were invalid, respondent had no right to increase its rates at any other time or manner than that provided by the state statutes; and that

"Said statutes also provide that pending the hearing before the city council said increased rates should

not be placed into effect, and in the event of an appeal, they should not be placed into effect until the appeal should be passed upon by the Railroad Commission", (R. 49);

and petitioner prayed that temporary injunction granted in the state court be made permanent, (R. 44-51); petitioner also alleged that it had another cause of action based on its construction of Section IX of the ordinance of June 13, 1930; that the consumers of gas in Texarkana, Texas, were entitled to an order from the court directing that respondent place into effect in the City of Texarkana, Texas, the rates applicable in the city of Texarkana, Arkansas; that respondent be required to make reparations in the City of Texarkana, Texas, based on the Arkansas rates. (R. 51-52).

On January 23, 1934, the city council completed hearing of respondent's application for increased rates (R. 181-183), and passed a resolution denying it because it stated that it refused to waive, but insisted upon certain provisions of the ordinance of June 13, 1930, and the resolution also ordered the city attorney "to insist upon his application now pending in the courts for an order directing said company to comply with its franchise agreement and to place in effect in Texarkana, Texas, the rates which it has been compelled to place in effect in Texarkana, Arkansas", and notifying respondent that one year later the city would enter upon a hearing to determine whether or not the rate should be reduced to 40c. (R. 285-321).

On March 3, 1934, respondent appealed to the Railroad Commission of Texas. (R. 183).

On March 9, 1934, respondent replying to petitioner's amended petition, filed answer and counterclaim, alleging: that Section VIII-A of the ordinance of June 13, 1930, was invalid; that respondent had done all it could to get relief from confiscatory rates by applying to the city council and appealing to the railroad commission; that its efforts were not unlawful; that it was suffering confiscation; that Section IX was invalid and inapplicable for reasons set out at R. 87, *et seq.*; that respondent was not then supplying gas in Texarkana, Arkansas, at the 1923 rates but at rates which were higher than those charged in the city of Texarkana, Texas (R. 20); that respondent was under no obligation to charge in Texarkana, Texas, the rates that had previously been charged in Texarkana, Arkansas; that the rates set out in Section V of the ordinance of June 13, 1930, or any lower rates were confiscatory; and prayed dissolution of the temporary injunction, cancellation of Sections VIII-A and IX, and general relief. (R. 81-98).

Petitioner prevented respondent from proceeding in the Railroad Commission of Texas. (R. 183). On April 21, 1934, petitioner filed motion to dismiss the appeal in the Railroad Commission, or in the alternative, that all further proceedings in the Railroad Commission be abated on account of the temporary injunction issued by the District Court of Bowie County, Texas, and that no action be taken until after final disposition of the suit in the federal court. (R. 183).

On May 23, 1934, petitioner filed a new suit in the District Court of Bowie County, Texas, setting up the same

causes of action as those in the first suit, and in addition made the Railroad Commission of Texas parties defendants (R. 264-283), alleging that the Railroad Commission should be enjoined

"from entertaining said appeal and from hearing the same and from taking any action thereon and from taking any action with reference to gas rates in the city of Texarkana, Texas, until after said Southern Cities Distributing Company has complied with the provisions of said franchise agreement calling for one year's notice" (R. 272),

and that respondent be enjoined "from prosecuting or taking any further steps in its appeal which had been lodged with the Railroad Commission of Texas." (R. 281).

The situation in the Railroad Commission was,

"Defendant undertook to proceed in the Railroad Commission and requested that plaintiff's Motion to Dismiss the Appeal be set for hearing and action, but so far its efforts to get any action at all have been unavailing." (R. 183).

"Defendant has taken all the steps open to it under the Texas statutes so far as it could." (R. 162).

The Railroad Commission refused

"to recognize or act upon the appeal at all unless defendant complies with a provision for a certain bond relating solely to the Resolution of December 12, 1933, which the Commission may not legally require," (R. 161),

and would not act unless such bond were filed. (R. 183, 184). The Commission was not authorized to grant super-sedeas or to require bond on the appeal from the council's

order of January 23, 1934, which denied defendant's application for increased rates, *Harris v. Municipal Gas Co.* (Civ. App., 1930), 59 S. W. (2d) 355. The Resolution of December 12, 1933, calling on the company to comply with its interpretation of Section IX was not appealable because it was not passed under the powers of the council as a rate regulatory tribunal and was not within the purview of Article 6058, Rev. St. of Texas 1925, as admitted by petitioner (R. 178-180), and the Railroad Commission had no jurisdiction over it. (R. 183, 184).

On July 11, 1934, petitioner's new suit having been removed to the federal court, respondent filed answer and counterclaim, setting out that respondent was prevented from proceeding with said appeal to the Railroad Commission (R. 357-400), and prayed like relief as in the first suit. This second suit was No. 109 In Equity in the federal court, the first being No. 106. On September 24, 1934, petitioner filed motion to strike out the answer and counterclaim in Case No. 109 (R. 99). On September 18, 1935, an order was made, consolidating Cases Nos. 106 and 109 and directing that the motion to strike the answer and counterclaim in No. 109 be considered as going also to the answer and counterclaim in No. 106 (R. 409-412).

On December 30, 1936, petitioner filed supplemental bill in the consolidated cases, pleaded certain events in Arkansas, and prayed that respondent be ordered

- (1) to place in immediate effect in Texarkana, Texas, certain Arkansas rates;
- (2, 3) to pay reparations, based on the Arkansas rates from June 13, 1930, to date of decree, divided into three periods of time;

- (a) June 13, 1930, to February 16, 1934;
 - (b) February 16, 1934, to December 4, 1936;
 - (c) December 4, 1936, to date of decree;
- (4) that for (a) and (c) periods the reparations be distributed to the gas consumers in Texarkana, Texas;
- (5) that reparations for (b) period be held in court conditioned on the outcome of the appeal in the Arkansas rate case. (R. 104-113).

On July 14, 1937, respondent filed separate amended answer and counterclaim, making numerous denials (R. 123-148), alleging that Sections VIII-A and IX were void and had been waived by the city council hearings, setting out the facts in fullest detail, and pointing out that plaintiff was undertaking for over seven (7) past years to upset *ab initio* the rates prescribed on June 13, 1930, by the city council of Texarkana, Texas, and to secure reparations for more than \$150,000.00 (R. 122-209). Respondent admitted that in 1930 it applied to the city council of Texarkana, Texas, for increased rates, which was rejected by the city council, and that respondent had in 1930 appealed to the Railroad Commission; alleged that said commission on that appeal conducted hearings; denied that while such hearings were going on respondent proposed to the city council a compromise of said rate controversy (R. 124), but alleged that during the hearings in the commission, a new rate schedule was proposed by petitioner, whereupon proceedings were re-opened in the city council and new rates were prescribed and a new franchise

granted by the ordinance of June 13, 1930, and the railroad commission approved the new rates and dismissed the appeal pending before it (R. 125), and alleged that rates prescribed in Section V of the ordinance of June 13, 1930, derived their force from the exertion of the regulatory power (R. 127); admitted that the ordinance of June 13, 1930, was accepted by respondent; denied that Section IX was valid as a contract as to rates on the part of petitioner or on the part of respondent; denied that respondent's acceptance of the ordinance of June 13, 1930, made Section IX thereof valid; alleged that Section IX was violative of the state statutes, invalid, and inapplicable, for numerous reasons set out at R. 149 to 158; that Section VIII-A was invalid and inapplicable for many reasons set out at R. 158 to 162; and respondent alleged confiscation in detail (R. 189-207). The court ordered that respondent's answer and counterclaim be accepted and considered in both suits, Nos. 106 and 109 (R. 227).

On July 19, 1937, petitioner filed motion to strike the respondent's pleadings (R. 228), and on July 30, 1937, the court in final decree held that respondent's pleadings were as a matter of law insufficient either as answers or counterclaims, struck them out, and adjudged that Section IX of the ordinance of June 13, 1930, was valid; that for the period from December 1, 1933, to February 16, 1934, respondent collected in Texarkana, Arkansas, the rates prescribed on May 8, 1923, by the city council of Texarkana, Arkansas; that the city of Texarkana, Texas, was entitled to recover reparations based on the Arkansas rates of May 8, 1923, for said period; that Section VIII-A was valid and enforceable, but moot (R. 231-237).

ARGUMENT.

POINT I. The Court of Appeals Correctly Held Section IX to be Invalid.

- (A) Section IX is void because it attempts unlawful abdication and delegation beyond the powers of the city council, violative of state statutes; because it is conditional, vague, indefinite and obscure; and because it would abrogate prescribed rates;
- (B) Neither the city nor the gas utility company can make a valid contract as to rates to be charged; the regulatory power is not subject to suspension nor surrender;
- (C) The rates set out in Section V of the ordinance of June 13, 1930, are controlling;
- (D) Cases cited by petitioner not in point;
- (E) The city council in taking jurisdiction and in holding hearings on the merits of the rates, abrogated and waived Section IX;
- (F) Asserted discrimination does not make Section IX valid;
- (G) Section IX is invalid and not a bar to judicial hearing and relief from confiscatory rates.

POINT II. Section IX was Inapplicable and Its Condition was not Fulfilled.

POINT I.

**THE COURT OF APPEALS CORRECTLY HELD
SECTION IX TO BE INVALID.**

The Court of Appeals held that Section IX of the ordinance of June 13, 1930, was invalid. Section IX is quoted in the statement of the case, *supra*, and is found at R. 18.

Respondent's argument under Point I is divided into the following parts: (A) Section IX is void because it attempts unlawful abdication and delegation beyond the powers of the city council, violative of state statutes; because it is conditional, vague, indefinite and obscure; and because it would abrogate prescribed rates; (B) Neither the city nor the gas utility company can make a valid contract as to rates to be charged; the regulatory power is not subject to suspension nor surrender; (C) The rates set out in Section V of the ordinance of June 13, 1930, are controlling; (D) Cases cited by petitioner not in point; (E) The city council in taking jurisdiction and in holding hearings on the merits of the rates, abrogated and waived Section IX; (F) Asserted discrimination does not make Section IX valid; and (G) Section IX is invalid and not a bar to judicial hearing and relief from confiscatory rates.

(A)

Section IX is void because it attempts unlawful delegation of the regulatory power, beyond the powers of the city council, violative of state statutes, because it is conditional, vague, indefinite, and obscure, and because it would abrogate prescribed rates.

The Court of Appeals, in the opinion under review, *Arkansas Louisiana Gas Company v. City of Texarkana*, Texas, June 3, 1938, 97 F. (2) 5, said:

"Appellant insists that the clause (Section IX) is completely invalid, because an attempt on the part of the City to surrender its non-delegable rate-making function to appellant, and the constituted authorities in Arkansas. It argues that by its charter the Texas city is authorized and obligated to exercise its governmental function of rate regulation, and that it may not, under its general powers to contract for rates, bind itself or appellant to operate under rates which may from time to time be fixed by and in Arkansas. It insists that the ratemaking function of cities in Texas embraces and includes the power to raise, as well as to reduce rates, in the interest of and in accordance with the public need. *City of Seymour v. Texas Electric Service Co.*, 66 Fed. (2d) 814; *Texas & Louisiana Power Co. v. City of Farmersville*, 67 S. W. (2) 235. It urges that 'this class of functions the City must perform. The City has no option. They are not to be exercised or ignored by the municipality at discretion. * * * Such functions are legal duties imposed by the state upon its creature.' *City of Uvalde v. Uvalde Electric & Ice Co.*, 250 S. W. 141; *Texas Gas Utilities v. City of Uvalde*, 77 S. W. (2d) 750. (fol. 431) It insists that this clause, which declares that 'grantee

shall not be authorized or permitted to charge or collect any higher rate than the lessened rate prevailing in Arkansas,' and if valid, obligates the appellant and the City to maintain a particular rate, merely because it has been instituted in Arkansas is contrary to the public policy of Texas, and void. It urges therefore, that the decree is fundamentally erroneous in adjudging the clause valid, instead of invalid, in retaining the bill to grant partial relief instead of dismissing it altogether. In the alternative, it argues that if wrong in this, and the clause is valid and enforceable at all, it is so only prospectively to compel the fixing of rates for the future in Texas, after they have been finally fixed either compulsorily, or by agreement in Arkansas, and not retrospectively, by way of refund, for the periods when in Arkansas the rates were in dispute." (R. 428-29; 97 F. (2) 5, 8).

"We think appellant has the right of it throughout, and that the decree should be reversed, both because the clause is completely invalid, and because, if valid and enforceable, it is without application here. But the clause is not valid. It is completely invalid and unenforceable as an attempt to abdicate and delegate the City's ratemaking function, and the decree should be reversed because it is. Whatever might be (fol. 434) said for the City's side of the case, if, as it assumes, the contract were in effect one in which the Utility had agreed, in consideration of the franchise, to maintain a fixed rate, we think it perfectly plain that the clause in question is not such a contract. Its effect is to abdicate, at least qualifiedly, the City's ratemaking function for the future, and to delegate it in the same qualified way, to the Utility and the Arkansas city.

"Under it, if the Utility decides to lower its rate in Arkansas by so much as a fraction, the rates then fixed by it become the rates which may be charged

in the Texas city. If the Arkansas city finally lowers its rates, ever so little or so much, those rates become the rates in Texas, no matter if those rates are deemed by the Texas city to be grossly unjust or inadequate. For this clause, unlike the clauses in the cases on which the City relies, is not one merely agreeing upon a rate which the Utility may charge. It is one purporting to bind the City and the Utility alike to abide by the future action of the Utility and the City of Arkansas, if less rates are put in there voluntarily or under final compulsion. The clause does not provide that the grantee shall be compelled, if required by the Texas city council, to put in the lessened Arkansas rates. It provides peremptorily and without qualification, that if the lessened rates are placed in in Arkansas, 'then and thereupon the lessened rates shall apply in the city of Texarkana, Texas, and grantee shall not be authorized or permitted to charge and collect any higher rate.' A more definite binding of the hands of the City Council, a more complete abdication of its rate-making function, a more complete delegation of it could hardly be imagined. In the light of these provisions, the supposed lack of mutuality of which appellant makes so much, and the City discounts as inapplicable, disappears from the case, for here, by a specific provision that the lessened rates shall apply, and that grantee shall not be authorized to charge (fol. 435) and collect any higher rates, is an attempt to mutually bind appellant and the City of Texarkana to any lessened rates which may in future be fixed within the Arkansas city.

"On the record before us the binding quality of this clause as it is conceived of by the City, is emphasized not alone by its suit for specific performance, by which it affirms the binding force as a contract of the clause it sues on, but by the undisputed fact that resting on the contract, it has entirely abdi-

cated its rate-making function, and has refused, upon the application of appellant that it do so, to exercise its rate regulating powers." (R. 431-432; 97 F. (2) 5, 9, 10).

Respondent's pleadings as to Section IX are found at R. 149-153, 163-168, 170-185, 189, 190-207.

Section IX amounts to unlawful delegation, to vesting in extra-territorial authorities and bodies outside the state of Texas, the non-delegable power and duty to regulate and fix the rates to be charged in the state of Texas under the laws applicable thereto. It is not permissible under the city charter to make the rates in Texarkana, Texas, vary with and depend on conditions in another city and state, and make controlling in the city of Texarkana, Texas, the rates enforced in the city of Texarkana, Arkansas. This would be equivalent to depriving the city council of Texarkana, Texas, of its lawful and sole jurisdiction. It is *ultra-vires* the power of the council. That body is charged with inalienable duty of functioning as a rate regulatory body. It may not, by contract or otherwise, suspend, surrender, abridge, or put in abeyance its ever-present duty to regulate the rates according to law when called upon; and the council, when fixing rates may not vary the rates prescribed by it, except in a lawful and authorized method. The variation of rates in Texarkana, Texas, dependent on action in another city and automatically following a zig-zag course, violates the state statutes that define the method and the basis on which rates are directed to be determined, and amounts to unlawful delegation of the regulatory power to a city in another jurisdiction and state having an entirely different regulatory

system (R. 152). Except to avoid rate troubles, it is unjustifiable to make the rates in Texarkana, Texas, follow the course of the rates in Texarkana, Arkansas, since there are differences in the taxes and expenses of the two cities, differences in *ad valorem* taxes, occupation taxes, license taxes, insurance rates, paving-cutting requirements, different physical properties, values, quantities of pipe, public liability rates, accidents, leaked gas, differences in soil conditions, depreciation requirements; in Texas there is a workman's compensaton, while in Arkansas the common law of master and servant applies. (R. 153).

Moreover, there is no power vested in the city of Texarkana, Texas, for fixing of a conditional rate, nor a rate to be charged on a contingency or subsequent and future event, nor a rate to take effect in the present, subject to being revoked and abrogated on account of the happening of some subsequent event or condition. Such a change or modification of rates is in violation of the well established rules that rates may be changed only in the method and on the basis prescribed by statute, after notice and hearing and then only in the event the facts justify.

The duty and authority of the city council to grant franchises and fix rates is coupled with the unconditional requirement that it must be by ordinance and that it must contain all the terms and agreemnts between the parties, which means that one may not be required to go to another jurisdiction to find out what the Texas rates are, and which means further that the ordinance cannot have incorporated in it some indefinite provision as to rates to perhaps become definite, when and if certain contingencies arise, or when and if something may be done by some other

tribunal or court, or which may result from an election in some other jurisdiction.

As Section IX at the time of its enactment was construed and acted upon, it was not contemplated that any rates which had in the past been prescribed by the city council of Texarkana, Arkansas, should be brought forward to govern and control future charges which defendant could collect as applicable rates to the distribution and sale of natural gas in said city of Texarkana, Texas. Subsequent to the date of the action of the city council of the City of Texarkana, Texas, in prescribing rates in Section V of the ordinance of June 13, 1930, a number of voters, all of whom were of the city of Texarkana, Arkansas, under a referendum amendment to the constitution of the State of Arkansas, petitioned said city of Texarkana, Arkansas, to submit to the voters of said city at an election, the question of approval or disapproval by said voters of the action of said city council of Texarkana, Arkansas, in passing the Resolution of May 30, 1930, in said city. Said city council refused said petition, but later on the petition was sustained by mandamus and an election was held. Said voters had an interest to serve in the result of the election in that it was to their pecuniary advantage to keep the rates to be charged them for natural gas down to the lowest figure possible, and as a result of said election, the said action of said city council of Texarkana, Arkansas, was revoked, and it was held in litigation in Arkansas that the rates which had been fixed by action of said city council of Texarkana, Arkansas, on May 8, 1923, were continued in effect to prevail until changed by further appropriate action.

It is these rates prescribed by the city council of Texarkana, Arkansas, on May 8, 1923, that petitioner contends that it is entitled to enforce in the city of Texarkana, Texas, under and by virtue of said Section IX. The method so used to bring about a reduction of the rates in Texarkana, Texas, is contrary to and in violation of the authority delegated by the legislature of the state of Texas to the city of Texarkana, Texas, with reference to determining rates, as is apparent from the provisions of the charter of said city constituting such delegated powers. Such method was not within the contemplation of either the city council of the city of Texarkana, Texas, or of defendant at the time of the adoption of said franchise ordinance of June 13, 1930. As is apparent from the facts and circumstances alleged and the laws referred to, the method so used to procure a continuation of the rates of May 8, 1923, in the city of Texarkana, Arkansas, is wholly illegal as applied to rates in the city of Texarkana, Texas, and unenforceable as against this defendant.

The United States Supreme Court in *San Antonio v. San Antonio Public Service Co.*, 255 U. S. 547, said:

"... the supposed condition operating upon the private owner would be nugatory." and that "it resolves itself into a mere issue of the exercise by government of its regulatory power." (p. 556).

It is well settled by the Supreme Court of Texas that the statutes of Texas deprive the utilities of the power to make rates and confer that power upon the regulatory body. *Railroad Commission v. Weld & Neville*, 96 Tex. 405; 73 S. W. 532. It follows that respondent had no

power to make rates, neither by contract nor otherwise; the rates were made by the regulatory body.

Missouri-Kansas & T. R. Co. v. Railroad Commission, (Tex. Civ. App.) 3 S. W. (2) 489 reads at p. 493:

"As tersely expressed by Associate Justice Brown in *Railroad Commission v. Weld & Neville*, 96 Tex. 405, 73 S. W. 532:

"The Railroad Commission Law deprived railroad companies of the power to make rates and conferred that authority upon the commission . . ." (p. 493).

"In the state act, as pointed out above, the rate-making power is taken away from the carrier **altogether** and vested **exclusively** in the commission . . ." (p. 495).

"The holding of the commission that the Wichita Falls rates, though approved by it, were in fact **made by the carriers, because made upon their application is unsound. Rates, to be effective under the Texas act, must be made by the commission, and are inoperative other than by force of its orders.**" (p. 496).

This case was affirmed by the Supreme Court of Texas. (13 S. W. (2d) 679, 682).

In Texarkana, Texas, the power to make gas rates is likewise taken away from the respondent "altogether" and vested in the city council "exclusively". When rates are made it is the city that must make them in accordance with the statutory power,—there being no power given to the city or the utility to contract, surrender, delimit, qualify, restrict, suspend, barter away, abdicate, or delegate the regulatory power.

From these excerpts it clearly appears that the rates fixed in Section V of the ordinance of June 13, 1930, in Texarkana, Texas, are operative not by reason of the acceptance by respondent of said ordinance, but having been made by the city council, they are **inoperative other than by force of the council's order.** To be effective under Texas laws, rates must be made by the regulatory body. Said rates set out in Section V, never having been set aside in the manner provided in the state statutes (the claim being that they are affected by Section IX, which is not the manner provided in the statutes), are the only lawful rates in Texarkana, Texas. As respondent at all times since June 13, 1930, has charged only such prescribed rates, no reparations are recoverable.

In this connection it will be well to bear in mind the circumstances under which the rates set out in Section V of said ordinance of June 13, 1930, were prescribed. Respondent had in 1930 made application to the city council of Texarkana, Texas, for change in rates, which, after hearing, was denied. Respondent then appealed to the railroad commission of Texas which held sessions in Texarkana and conducted hearings. In the course of the hearings, the city council of Texarkana, Texas, decided to grant a somewhat increased schedule of rates, whereupon new proceedings were opened in the city council, and further hearings were held and this resulted in the city council's prescribing the schedule of rates set out in said Section V. The railroad commission approved the new schedule and dismissed the appeal pending before it. Later, on June 17, 1930, respondent accepted the ordinance of June 13, 1930,

which as aforesaid included in Section V the prescribed rates. (R. 124, 125).

The Commission of Appeals in the same case on writ of error, 13 S. W. (2) 679, said:

"We fully concur in the holding of the Court of Civil Appeals in the able opinion rendered by its Chief Justice, wherein it is held that the above article does not confer authority upon the Railroad Commission to award reparations where the carrier is acting under a rate duly approved by such Commission. We think the opinion of that court so thoroughly answers the contentions here made that it renders it unnecessary for us to elaborately review the questions involved." (13 S. W. (2) 681).

". . . This tribunal being vested with jurisdiction as to ascertain what is a fair and reasonable freight rate, **its determination of the question is conclusive until set aside** by the courts in the manner provided by the statutes." (*Id.* 682).

This case was affirmed by the **Supreme Court of Texas**. (13 S. W. (2) 679, 682).

In *Nairn v. Bean* (Com. 1932), 48 S. W. (2d) 584, the Commission of Appeals in Texas said:

"It is well settled that no governmental agency can, by contract or otherwise, suspend or surrender its functions, nor can it legally enter into any contract which will embarrass or control its legislative powers and duties or which amounts to an abdication thereof." (p. 586).

This opinion was adopted by the **Supreme Court of Texas** (p. 586).

In *Bowers v. City of Taylor* (Com. 1939), 16 S. W. (2d) 520, the Commission of Appeals in Texas said:

"The principle is well settled that a city cannot by contract or otherwise surrender its governmental or legislative functions, nor can it legally enter into any contract which will embarrass or control its legislative powers and duties or which amount to an abdication of its governmental function or of its police power." (p. 521).

The Supreme Court of Texas approved the above holdings of the Commission (p. 522).

The Supreme Court of Texas in *City of Brenham v. Brenham Water Co.*, 67 Tex. 533, 4 S. W. 143, 149, said:

"It is now universally conceded that 'powers are conferred on municipal corporations for public purposes; and, as their powers cannot be delegated, so they cannot be bargained or bartered away. Such corporations may make authorized contracts, but they have no power, as a party to make contracts or pass by-laws which shall cede away, control, or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties.' . . . If the contract relied on is valid, neither the repeal of the charter of the city, nor any other act of the legislature, can abrogate it."

Texas Gas Utilities Co. v. City of Uvalde (San Antonio Court of Civil Appeals, Dec. 2, 1934), 77 S. W. (2d) 750, reads:

"In the first place, the fixing of gas rates is the exercise of a legislative power and not a judicial power. In the second place, the Legislature has delegated this power to the city council of cities having a population of more than 2,000 inhabitants, with the right

of appeal to the Railroad Commission of the state, for a trial de novo, and with a limited right of resort to any district court of Travis County. Articles 1119, 6058, 6059 R. S. 1925; *City of Uvalde v. Uvalde Electric & Ice Co.* (Tex. Com. App.) 250 S. W. 140; *Community Natural Gas Co. v. Natural Gas & Fuel Co.* (Tex. Civ. App.) 34 S. W. (2) 900; *Coleman Gas & Oil Co. v. Santa Anna Gas Co.* (Tex. Com. App.) 67 S. W. (2d) 241.

"Appellant contends that this is not a 'rate' case, but a 'discrimination' case, and that therefore article 6057 R. S. 1925, gives the district court of Val Verde County jurisdiction. Article 6057 expressly provides that different rates may be charged in different places, and the fact that appellant had a different rate at La Pryor or Carrizo Springs, or some other city, would not give a district court the legislative power of fixing rates for the city of Uvalde." (p. 751).

"It is clear that the city of Uvalde, under the provisions of article 1119 R. S. 1925, has the legislative power to fix gas rates, and, having this power, it cannot barter it away by entering into a contract for specific rates over a period of years, and this is true whether the contract is attempted to be made for the installment of a system or afterwards. *City of Uvalde et al v. Uvalde Elec. & Ice Co.* (Tex. Com. App.) 250 S. W. 140; *Railroad Commission of California v. Los Angeles Ry. Corp.*, 280 U. S. 145, 50 S. Ct. 71, 74 L. Ed. 234; *Home Tel. Co. v. Los Angeles*, 211 U. S. 265, 29 S. Ct. 50, 53 L. Ed. 176; *Freeport Water Co. v. Freeport*, 180 U. S. 587, 21 S. Ct. 493, 45 L. Ed. 679.

"The power to fix rates is absolutely inconsistent with the power to contract for rates, and the city of Uvalde cannot possibly enter into a valid contract for rates, but rates therein must be controlled by the city's rate fixing power." (p. 752)

In *Horne Zoological Arena Co. v. City of Dallas* (Civ. App. 1932), 45 S. W. (2) 714, the Court said:

"The general rule is that where the law creates a board to have charge of the affairs of a municipality or a particular part thereof, such board may appoint agents to discharge ministerial duties not calling for the exercise of reason or discretion, but it cannot go beyond this and delegate to others the discharge of duties which call for reason and discretion and which are regarded as a part of the public trust assumed by the members of such board. The power to exercise discretion in matters trusted to such boards cannot be delegated, surrendered or bartered away."

In *Green v. San Antonio Water Supply Co.* (Civ. App. 1917), 193 S. W. 453, the court held that power to regulate rates is "governmental in nature" and that "it must be exercised by the body or officials to whom it is intrusted and cannot be by them delegated to others", citing *3 Dillon Municipal Corporation* (5th Ed.), p. 2233, par. 1325; *Id.* p. 2133, par. 1303; that this power is inherent in the state, and in Texas can be vested in a municipality, but that the power must be exercised by the city in the manner required by the charter without delegation.

In *City of Corpus Christi v. Central Wharf* (Civ. App. 1894), 27 S. W. 803, the court held that the power to provide for improvement of the harbor and wharves and for the regulation of charges for the use thereof was essentially legislative and therefore lodged in the legislature; that the act in question vested said power to the local city government for exercise in its legislative discretion for the best interest of the people; that "such powers as these, when conferred upon municipal governments, can-

not be delegated, surrendered or bartered away"; that "this principle is recognized by our Supreme Court in the case of *McDonell v. Railroad Com.*, 60 Tex. 531."

The rule of Texas, which is general, is stated in 30 *Tex. Juris.*, pp. 115, 116, 117, para. 56, as follows:

"Delegation, Surrender, or Abrogation of Functions or Powers by Municipality or Governing Board.—A municipal corporation cannot, by contract or otherwise, surrender, delegate, or barter away its governmental or legislative function or powers whose use and continued availability are essential to the public good; nor can it legally enter into any contract which will embarrass, prevent, control or interfere with its future exercise of such powers. A statute which attempts to give it authority so to do violates the constitutional inhibition against irrevocable or uncontrollable grants of special privileges or immunities. Moreover, governmental power must be exercised by the body or officials to whom it is intrusted; they cannot lawfully delegate it to others. The governing body cannot abrogate power and discretion vested in it by the voters or delegate powers granted it by the charter or a statute to any other officer or board or to a committee of its members. Thus a municipality cannot surrender, abrogate or barter away police power, surrender control over its property, or delegate to another municipality the right to pass legislation for it or make a contract binding on it affecting the rates or service of a public utility corporation."

Mr. Dillon says in Vol. 1, page 460, para. 244, that:

"The principle is a plain one, that public powers or trusts devolved by law or charter upon the council or governing body, to be exercised by it when and

in such manner as it shall judge best, **cannot be delegated to others.**"

The Court of Civil Appeals of Texas in *City of Texarkana v. Southwestern Tel. & Tel. Co.*, 106 S. W. 915, at 917 said:

"The public highways of the state, including even the streets and alleys within incorporated towns and cities, belong to the state, and the supreme power to regulate and control them is lodged with the people through their representatives—the Legislature. Whatever power of control is lodged in the city council is delegated by the Legislature. . . ."

"We are also of opinion that the trial court did not err in holding void the city ordinance attacked by appellee. Section 2 of said ordinance reads: . . . Conceding that the power to regulate the disturbance of the surface of streets and alleys in appellant city as against telephone companies rested in its city council, that power, as already pointed out, was a power conferred upon it by the Legislature, and one which could not be again delegated to another, as in the present instance to the city marshal. The ordinance appears to clothe the city marshal with authority to issue permits when the same were deemed necessary, and to permit that officer to determine whether or not such necessity existed. To this extent at least the ordinance was void. *G. C. & S. Fe Ry. Co. v. Riordan* (Tex. Civ. App.) 22 S. W. 519; *Bennison v. City of Galveston*, 18 Tex. Civ. App. 20, 44 S. W. 613."

See also good discussion in *Arkansas Missouri Power Co. v. City of Kennett, Mo.*, 78 Fed. (2) 911, 916-924.

The case of *Dallas Power & Light Corporation v. Carrington* (Tex. Civ. App.), 245 S. W. 1046, involved

the rates in two adjoining cities, Dallas, Texas, operating under a special act with powers and duties defined in the charter creating it, and Highland Park, a separate corporation of 2,800 population, organized under the general laws of the state subject to the limitations and having the authority set out in such general statute. The city of Dallas in 1917 granted a franchise to supply light and power to users within the city limits and beyond. The grantee in the franchise supplied light at the franchise rates of 6c in Dallas and beyond until June 1, 1920. Although Highland Park had the power by general statute to regulate the rates it did not do so nor did it grant any franchise. On June 1, 1920, the owner of the system raised the rate in Highland Park, but continued the 6c rate in Dallas. On October 14, 1920, the city of Highland Park enacted an ordinance adopting, in so far as applicable to such town, the provisions of the Dallas franchise with a view of maintaining the same character of service and rates as in Dallas, and on October 18, 1920, brought suit to enjoin the charging in Highland Park of a higher rate than that charged in Dallas, and that Section 25 of the Dallas franchise accepted by the utility, was binding on the utility. (Section 25 set out at p. 1048, may be compared with Section IX of the ordinance of June 13, 1930, of Texarkana, Texas). As to Section 25, the Court said:

" . . . even if this section did attempt to fix a rate for Highland Park, such could not legally be done, and any effort in that respect would be a nullity. A municipal corporation, existing under a special act of the Legislature, has only such powers as are conferred it by its charter. And nowhere in the Dallas charter is the power conferred on the

city of Dallas to legislate or fix public utility rates for Highland Park. In its own sphere, each municipal corporation is supreme; but it cannot invade the province of another municipality and legislate for it, whether such legislation be for its benefit or to its detriment. Co-extensive with its own limits, the city of Dallas can legislate on all subjects affecting it, subject only to its charter limitations and to the laws of the state. But beyond this it cannot go. The laws, ordinances, and contracts of Highland Park and those affecting its internal conduct and affairs can be made by the town of Highland Park alone, subject only to the general laws of the state. Only Highland Park can contract with public utilities for service to be given and rates to be charged that municipality. The city of Dallas is powerless to do so. Therefore whether or not the city of Dallas attempted to legislate or contract for Highland Park or to fix the character of service to be given or the rates to be charged such town for light, it could not lawfully do so, and such attempt was ultra vires, beyond its charter powers, of no effect, and void." (p. 1048).

As to the ordinance adopted by Highland Park on October 14, 1920, the Court said:

"The proposition is advanced by appellees that the town of Highland Park, acting under the authority of Article 1018 of the Revised Statutes, enacted an ordinance on October 14, 1920, by which it fixed a rate to be charged for light, and that such ordinance binds appellant to furnish light to appellees on the basis therein specified. An ordinance is a by-law of a municipality passed by its governing body for the regulation, management, and control of its affairs and that of its citizens. Its validity is dependent upon strict compliance with the laws of the state relative to legislative enactments and upon the

terms of such city's charter if it has one. It must be clear, definite, and free from ambiguity. Measured by these rules, the ordinance of October 14, 1920, passed by the council of Highland Park, cannot stand. It seeks merely to adopt the provisions of the Dallas franchise relating to service and rate 'in so far as applicable to Highland Park.' As counsel for appellant facetiously remarks: 'How far is that?' Such ordinance is manifestly too vague and obscure to have any validity, and therefore is void; its meaning not being susceptible of ascertainment. *McQuillin on Municipal Corporations*, Sec. 651; *State v. Cedaraski*, 80 Conn. 478, 69 Atl. 19; *Chicago I. & L. Ry. Co. v. Salem*, 166 Ind. 71, 76 N. E. 631; *San Francisco Woolen Factory v. Brickwedel*, 60 Cal. 166. But there is another and equally cogent reason why such ordinance is of no effect. A municipal corporation can no more delegate to another municipality the right to pass legislation for it, than it can itself legislate for such other, or outside its own limits. No power or authority exists in Highland Park by state law or elsewhere either express or implied to delegate to the city of Dallas the right to make a binding contract affecting its rates or service or concerning its internal affairs. Any act attempting such unwarranted delegation of authority would be beyond its corporate powers, invalid, and unenforceable. Therefore, on account of its unauthorized attempt to delegate the lawmaking power of Highland Park to another municipal corporation as well as from its vagueness and ambiguity, the ordinance in question is void, and no right thereunder accrued to appellees by which they could force appellants to furnish light under its terms." (pp. 1048, 1049).

"We conclude therefore that the city of Dallas cannot legislate nor fix a rate for the town of Highland Park; nor can the town of Highland Park delegate such right to the city of Dallas by ordinance or other-

wise; . . . that the ordinance passed by the council of Highland Park on October 14, 1920, is invalid; . . ." (p. 1050).

For the same and additional reasons Section IX of the ordinance of June 13, 1930, in Texarkana, Texas, is void. Section IX of the franchise ordinance passed by the council of Texarkana, Texas, on June 13, 1930, is likewise very indefinite and "too vague and obscure . . . its meaning not being susceptible of ascertainment". It is unsound to read into Section IX the meaning contended by petitioner either as to the past or the future, or to make the rates in Texarkana, Texas, conform to the complicated course of the Arkansas rates. Amongst other obscurities, there is no time of duration for the Arkansas rates to be applied in the city of Texarkana, Texas.

Section IX conflicts with and, if valid, would operate to change the laws of Texas, to deprive the council of its jurisdiction, to unlawfully abrogate prescribed rates, to delegate and vest in extra territorial authorities and bodies outside the state of Texas, the non-delegable police or rate power. Moreover, the attempt would be to make the rates vary upon conditions, contingencies and uncertainties not authorized by law.

Section IX of the ordinance is ineffective for any purpose. It certainly does not even purport to provide for reparation, but, if said Section IX could be considered to be sufficiently definite and unambiguous to be interpreted to provide for refunds for any certain period, it would be invalid and void under the decisions and laws of Texas.

(B)

Neither the city nor the gas utility company can make a valid contract as to rates to be charged; the regulatory power is not subject to suspension nor surrender.

On the proposition that neither the city nor the utility in the state of Texas can make a valid contract as to the rates to be charged, it is important to set out the rules laid down in Texas as to the powers of a city and also the state statutes governing the city of Texarkana, Texas.

It is well settled in Texas that all acts of a city beyond the scope of its powers are void, and that the methods prescribed for exercise of said powers, exclude all other methods and must be followed. Squarely in point is the language of Chief Justice Cureton of the Supreme Court of Texas, in the *Waco Case* quoted and followed in the important recent case of *Texas-Louisiana Power Co. v. City of Farmersville* (Com. 1933, Justice Sharp, now a member of the Supreme Court of Texas) which was adopted by the Supreme Court of Texas, 67 S. W. (2) 235:

"Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void." (p. 239).

"In that opinion (*Foster v. Waco*, 113 Tex. 352, 255 S. W. 1104 by the Supreme Court, Chief Justice Cureton) it was also said: 'That where a power is granted and the method of its exercise prescribed, the prescribed method excludes all others and must be followed'". (p. 239).

The city charter of Texarkana, Texas, is a state statute which defines and limits the powers of the city council. The charter provisions make it mandatory that the power of regulating, controlling and fixing rates be retained in the city council, going so far as to say that if provisions retaining in the city council its jurisdiction over rates should be omitted from any franchise, the reservation shall be considered just as though expressly stipulated in the franchise. The city charter also commands the city council not to prescribe any rate yielding less than 10% on the actual cost of the utility plant. The following sections of the city charter, set out in respondent's pleading, R. 163-166, and in the appendix to this brief, have been in for thirty years and are still in force in Texarkana, Texas:

Section 163.

"Said proposed franchise shall contain all the terms and agreements between the parties thereto, and it must expressly set forth that the council shall have the right and privilege . . . of fixing fares, rates . . ." (R. 165).

Section 163-a.

"In the event that any franchise . . . shall not contain such stipulations . . . it shall nevertheless be considered that all of the stipulations contained in Sections 162, 163 and 197 are part and parcel of the said contract and franchise, just as though written therein . . ." (R. 165, 166).

Section 196.

"The city council shall have the power to regulate by ordinance the rates and compensation to be charged by all . . . gas . . . companies . . . ; provided that the city council shall not prescribe any rate or compensation which will yield less than ten percent per annum on the actual cost of the physical properties, equipment and betterments. . . ." (R. 166).

Article 1119, Revised Civil Statutes of Texas, 1925, which is set out in the appendix and which is the same as Article 1018 of the Revised Civil Statutes of 1911, was originally enacted in 1907. This Article, while it applies to cities incorporated under the general law, is in the identical language of Section 196 of the city charter of Texarkana, Texas. It was interpreted in the important *Uvalde Case*, *infra*, to prevent the city of Uvalde from having any right to contract as to rates. It is inconceivable that any different construction should be given to Section 196 of the city charter and it follows that the city of Texarkana, Texas, is likewise prohibited from contracting as to rates. (The original Article 1119 remained in force until its effective amendment in 1937; see *Texas-Louisiana Power Co. v. Farmersville* (Com.), 67 S. W. (2) 235; Vernon's Annotated Statutes, Vol. 2, p. 132, 1937, pocket parts).

Compare also Article 1124, Revised Civil Statutes of Texas, 1925, set out in the appendix, (R. 167), which has been in effect ever since its passage in 1921, and which provides that any city with a special charter and authority to fix and regulate rates shall in determining and regulating such rates base the same on the fair value of the property devoted to public service in such city. This article makes it mandatory for the city council to use fair value and no other basis for determining rates.

The Constitution of State of Texas provides in Article I, Section 17, as follows:

"Section 17. No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, ex-

cept for the use of the State, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof."

And Sections 3 and 4 of Article XII of the Constitution of the State of Texas provide as follows:

"Section 3. The right to authorize and regulate freights, tolls, wharfage or fares levied and collected or proposed to be levied and collected by individuals, companies or corporations for use of highways, landings, wharves, bridges and ferries, devoted to public use, has never been and shall never be relinquished or abandoned by the state, but shall always be under Legislative control and depend upon Legislative authority."

"Section 4. The first Legislature assembled after the adoption of this Constitution shall provide a mode of procedure by the Attorney General and District or County Attorneys in the name and behalf of the State to prevent and punish the demanding and receiving or collection of any and all charges, as freight, wharfage, fares, or tolls, for the use of property devoted to the public, unless the same shall have been specially authorized by law."

All room for doubt has been removed by the decided cases.

The leading case in Texas is *City of Uvalde v. Uvalde Elec. & Ice Co.* (1923 Commission of Appeals) 250 S. W. 140 (Judgment of the district court and the Court of Civil Appeals affirmed, adopted and entered in the judgment of the Supreme Court of Texas, p. 142). The *Uvalde Case* has been quoted, cited and approved many times, and is

decisive of the case at bar. It holds that neither the city nor the utility can contract as to rate provisions, whether or not such provisions are accepted by the utility. The trial court sustained demurrer to the city's petition. The question involved was whether or not there existed a contract as to rates.

"By Article 1018, Revised Civil Statutes of Texas 1911, [the same as Article 1119, Revised Civil Statutes of Texas, 1925] the city councils of cities of the class of Uvalde are authorized to regulate the rates to be charged by light companies engaged in furnishing light to the public with the restriction that the city council or board of aldermen shall not prescribe any rate or compensation which will yield less than 10%. . . .

"The functions of municipal corporations, though all of them are of a public nature, may be divided into two great classes . . . either governmental functions . . . in the the administration of affairs affecting the people generally, or proprietary business powers. Those functions . . . in its capacity as an agent of the state are strictly limited by the statutory provisions granting them. In the exercise of these functions, the municipality is an arm of sovereignty, and its powers are strictly construed.

"This class of functions, the city must perform. The city has no option. They are not to be exercised or ignored by the municipality at discretion. . . . Such functions are legal duties imposed by the state upon its creature." (p. 141).

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"In other words, could the city of Uvalde surrender or barter away its power to regulate light rates by a contract suspending the exercise of that power? Since the statutes give the city no express power to contract with respect to rates for lights, whatever

power, if any, it has so to contract must arise from implication. . . . We think the city did not have implied power to make a contract for light rates. The grant of power by the Legislature to the city to regulate those rates was an exclusion of the power to make a contract for light rates that would suppress or suspend the expressly granted power to regulate.

"The power to regulate rates and the power to stipulate by contract for a term of ten years for rates cannot coexist. If the city has the power thus to contract, then it has not the power so to regulate during the term of the contract.

"The rule has been established by the courts that the Legislature may by express words authorize municipal corporations to enter into contracts prescribing the rates that may be charged by public utility corporations for a defined time, and that such contracts do have the effect of suspending, during the life of the contract, the governmental power of regulating such rates. (Citing many cases). But for a contract to have that effect the authority to make it must be clear and unmistakable. All doubts must be resolved against the municipality's authority to make such a contract and in favor of the **continuance of its governmental power.** (Citing many cases)" (page 141).

* * * * *

"The power to regulate rates granted to the city by the legislature imposed a duty upon the city to exercise that power, and was of such a fiduciary nature that it could not be surrendered or put in abeyance. The language of the statute is:

"The city council of all cities and towns in the state of Texas of over two thousand inhabitants shall have the power to regulate . . . the rates. . . ."

"In the case of *Mason v. Fearson*, 9 How. 248, 259, 13 L. Ed. 125, the Supreme Court of the United States, discussing whether or not the effect of a statute was compulsory or discretionary, said:

'Whenever it is provided that a corporation or officer "may" act in a certain way, or it "shall be lawful" for them to act in a certain way, it may be insisted on as a duty for them to act so, if the matter, as here, is devolved on a public officer, and relates to the public or third person.' " (p. 142).

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"When a public body or officer is clothed by statute with power to do an act which concerns the public interest, or the right of third person, the execution of the power may be insisted on as a duty, though the statute creating it be only permissive in its terms." (p. 142).

As shown below, the *Uvalde Case* (judgment recommended by the Commission of Appeals adopted by the Supreme Court of Texas) has been frequently and recently approved and quoted by the Texas courts. In this connection we direct attention to the weight to be given to the opinion of the Commission of Appeals. The Supreme Court of Texas, in July, 1935, in *National Bank of Commerce v. Williams*, 125 Tex. 619, 84 S. W. (2) 691, 692, said:

"Finally, we wish to say that the Supreme Court is now adopting all opinions of the Commission as the opinions of the court itself. These adopted opinions are given the same force, weight, and effect as the opinions written by the members of the Supreme Court itself. There are, however, a great many opinions of the commission which appear in the Southwestern Reporter that were not adopted

or approved by the Supreme Court. These opinions are not binding on the court in the same sense that the approved and adopted opinions are, but they are given great weight by us, and the courts of civil appeals and all lower courts should feel constrained to follow them, until they are overruled by the Supreme Court."

Petitioner states that the *Uvalde Case* came out while the *Geller Case* was pending in the Supreme Court of Texas and briefs were filed arguing the effect of that case, (p. 35 of petitioner's brief) ; yet the *Uvalde Case* was not qualified or criticized in any respect,—certainly it was not overruled.

In the *Geller Case* (*Dallas St. Ry. Co. v. Geller*, 271 S. W. 1106, 114 Tex. 484) the plaintiff, an elector in the City of Dallas, Texas, was held not entitled to an injunction preventing the utility from raising its rates above the alleged contractual rate designated as the maximum fare under the utility's franchise, but that the matter of rates was subject to the regulatory power. Petitioner cites the *Geller Case* as authority for the proposition that a Texas city cannot be bound by an attempted contract as to rates but that a utility may be bound by such contract as to rates,—even where rates are confiscatory. The argument of petitioner appears to be directly contrary to the *Geller Case* and to the *Altgelt Case*, 81 S. W. 106, which was quoted in the *Geller Case*, and contrary to the same case in the United States Supreme Court (200 U. S. 304) which was also quoted in the *Geller Case*, and with which the

Supreme Court of Texas stated it was in accord. Respondent does not agree that the holding of the *Geller Case* is as argued by petitioner, neither do we believe such a holding can be found in the Texas jurisprudence. No discussion or application of the *Geller Case* has been made in any subsequent cases; the *Geller Case* has been cited only once in a subsequent case in Texas, and then relating to a question of referendum, *Denman v. Quin*, (Tex. Civ. App.) 116 S. W. (2) 783 at p. 786. But the *Geller Case* is considered to support respondent. There is no conflict between its decision and the *San Antonio*, *Altgelt*, or *Houston Cases* in any respect, as shown below. The court in the *Geller Case* approved the holding of the Court of Civil Appeals which "held in accord with" the *Altgelt Case* and in accordance with "the other cases cited above" (*San Antonio v. San Antonio Public Service Co.*, 255 U. S. 547, and *Southwestern Tel. & Tel. Co. v. City of Dallas* (Tex. Civ. App.) 174 S. W. 636). The court said these cases held that the rate schedule was in the legislative control within the limits of the Constitution and the laws which control the rights of property. Petitioner goes so far as to attempt to make asserted contract as to rates prevail over prescribed rates which is tantamount to contending that such attempted contract rates are paramount and controlling over the regulatory power, and that the regulatory power is subject to asserted contract as to rates.

It is clear that the *Uvalde Case* has not been overruled or qualified by any other case, but has been frequently discussed, approved, quoted and cited by many Texas courts including an important case in 1935 by the Supreme Court of Texas.

The Supreme Court of Texas, in the case of *Lower Colorado River Authority v. McCraw, Attorney General of Texas*, (1935) 125 Tex. 268; 83 S. W. (2) 629, recognized the principles of the *Uvalde Case* as being well established:

"It is well established in this state that the Legislature may, by express words, authorize municipal corporations to enter into contracts, prescribing the rates that may be charged by public utility corporations for a definite time. *City of Uvalde v. Uvalde Electric & Ice Co.* (Tex. Com. App.) 250 S. W. 140, and numerous authorities there cited. Of course, such right does not exist unless the legislative authority therefor is clear and unmistakable. *Id.*"

In *Texas-Louisiana Power Co. v. Farmersville* (1933), 67 S. W. (2) 235, the Commission of Appeals (judgment recommended adopted by the Supreme Court of Texas, p. 240) cited the *Uvalde Case* as definitely setting a rule in Texas (p. 239). The opinion was by Mr. Justice Sharp, now on the Supreme Court of Texas.

In *Southern Prison Co. v. Rennels* (1937), 110 S. W. (2) 606, at 609, the Court of Civil Appeals cited the *Uvalde Case*, and also the case *Texas Gas Utilities Co. v. City of Uvalde*, 77 S. W. (2) 750, quoted below.

In *City of Ft. Worth v. George* (1937), 108 S. W. (2) 929, the Court of Civil Appeals quoted excerpts of the *Uvalde Case*.

In the case of *Texas Gas Utilities Co. v. City of Uvalde*, (1934), 77 S. W. (2) 750, which has been cited in

three recent Texas cases, the Court of Civil Appeals of San Antonio said:

"It is clear that the city of Uvalde, under the provisions of Article 1119 R. C. S. 1925, has the legislative power to fix gas rates, and, having this power, it cannot barter it away by entering into a contract for specific rates over a period of years, and this is true whether the contract is attempted to be made for the installment of a system or afterwards. *City of Uvalde et al v. Uvalde Elec. & Ice Co.* (Tex. Com. App.) 250 S. W. 140; *Railroad Commission of California v. Los Angeles Ry. Corp.*, 280 U. S. 145, 50 S. Ct. 71, 74 L. Ed. 234; *Home Tel. Co. v. Los Angeles*, 211 U. S. 265, 29 S. Ct. 50, 53 L. Ed. 176; *Freeport Water Co. v. Freeport*, 180 U. S. 587, 21 S. Ct. 493, 45 L. Ed. 679,"

and,

"The power to fix rates is absolutely inconsistent with the power to contract for rates, and the city of Uvalde cannot possibly enter into a valid contract for rates, but rates therein must be controlled by the city's rate-fixing power." (p. 752).

City of Wink, et al., v. Wink Gas Co., (Texas Civil Appeals) El Paso, March 24, 1938; 115 S. W. (2) 973, 976 reads:

"The power of the city to regulate rates to be charged by public utilities and to prescribe rules and regulations under which such commodities shall be furnished is governmental. It may not be bartered away. The city may not by contract impair or limit this right. The power was delegated by the state. The city, as the agent of the state, is under the duty of exercising the power when its exercise is necessary. *City of San Antonio v. San Antonio Irr. Co.*, 118 Tex. 154, 12 S. W. (2) 546; *City of Brenham v.*

Brenham Water Co., 67 Tex. 542, 4 S. W. 143; Texas Gas Utilities Co. v. City of Uvalde, Tex. Civ. App., 77 S. W. (2) 750."

The Supreme Court of Texas in *City of Brenham v. Brenham Water Co.*, 67 Tex. 533, 4 S. W. 143, 149, said:

"It is now universally conceded that 'powers are conferred on municipal corporations for public purposes; and, as their powers cannot be delegated, so they cannot be bargained or bartered away. Such corporations may make authorized contracts, but they have no power, as a party to make contracts or pass by-laws which shall cede away, control, or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties.' . . . If the contract relied on is valid, neither the repeal of the charter of the city, nor any other act of the legislature, can abrogate it."

It is settled in Texas that no reparations are recoverable where a utility is acting under a rate approved by the appointed regulatory body and that the authorization of a tribunal vested with jurisdiction over rates is conclusive until set aside in due course, *Producers' Refg. Co. v. Missouri-Kansas & T. R. Co.* (Tex. Com. App.) 13 S. W. (2) 679, at 681, 682 (judgment of Court of Civil Appeals, as recommended by the Commission of Appeals was affirmed by the Supreme Court of Texas per Chief Justice Cureton, p. 682).

It is also well settled by the Supreme Court of Texas that the statutes of the State of Texas deprive the utilities of the power to make rates and confers that authority upon the regulatory body, *Railroad Commission v. Weld & Neville*, 96 Tex. 405, 73 S. W. 532, per Justice Brown.

This latter case was quoted and approved by Chief Justice McClendon in *Missouri-Kansas & T. R. Co. v. Railroad Commission* (Tex. Civ. App.) 3 S. W. (2) 489, at 493. Justice McClendon also said:

"In the state act, as pointed out above the rate-making power is taken away from the carrier altogether and vested exclusively in the commission . . ." (p. 495).

"The holding of the commission that the Wichita Falls rates, though approved by it, were in fact made by the carriers, because made upon their application is unsound. Rates to be effective under the Texas act, must be made by the commission and are inoperative other than by force of its orders." (p. 496).

The Commission of Appeals said:

"We fully concur in the holding of the Court of Civil Appeals in the able opinion rendered by its Chief Justice." (13 S. W. (2) 680).

The decision was affirmed by the Supreme Court of Texas, 13 S. W. (2) 679, 682.

The United States Supreme Court also has carefully analyzed and overthrown the claim that a valid contract as to rates may be made in the State of Texas, and held that there would be such an inevitable conflict between the right to contract as to rates and the dominant power to regulate, as to render the contract inoperative and causes it to perish from the mere fact of admitting it to conflict with the authority to regulate, that it was resolved into a mere exercise of the regulatory power.

Mr. Chief Justice White, in *San Antonio v. San Antonio Public Service Company*, 255 U. S. 547, (1921), said that the solitary question to be considered was whether a contract existed empowering the city to enforce the confiscatory rate, and held that the ordinance was not and could not be a contract.

"Indeed, this result is persuasively established by the ruling in the *Altgelt Case*, to the effect that if the contract right were conceded, there would, in view of the constitutional restriction, be such an inevitable conflict between that right and the dominant power to regulate, as to render the contract inoperative, and, therefore, to cause it to perish from the mere fact of admitting its conflict with authority to regulate." (p. 555).

"But besides, the error underlying the proposition is not far to seek. The duty of an owner of private property used for the public service to charge only a reasonable rate and thus respect the authority of government to regulate in the public interest, and of government to regulate by fixing such a reasonable rate as will safeguard the rights of private ownership, are interdependent and reciprocal. Where, however, the right to contract exists and the parties, the public, on the one hand, and the private owner, on the other, do so contract, the law of contract governs both the duty of the private owner and the governmental power to regulate. Were, therefore, as in the case supposed in the argument, the regulating power of government wholly uncontrolled by contract, it would follow that the power would be required to be exerted, and hence the supposed condition operating upon the private owner would be nugatory. Such a case really presents no question of a condition, since it resolves itself into a mere issue of the exercise by government of its regulatory power." (p. 556).

The Court further referred to "assumed restraint" put by an existing contract as to rates, and said that the contentions of the city illustrated

"the erroneous theory upon which the entire argument of the city proceeds; that is, that limitations by contract upon the power of government to regulate the rates to be charged by a public service corporation are to be implied for the purpose of sustaining confiscation of private property." (p. 558).

This case, which arose upon application of the utility for a rate increase which was refused by the city on the ground that the company was bound by the franchise contract to a 5c fare, affirmed the district court's holding that the company not bound by contract and enjoining the city from enforcing the asserted contractual rate and from interfering with the company in substituting a 7c fare for the 5c fare. (p. 554). The holding was that there was not and could not have been a contract as to rates. As the facts in the case at bar are very close, the reasons that were controlling there should be controlling here. The prescribed rates are conclusive until changed for the future in the manner prescribed in the state statutes. Where rates that are approved by the regulatory body, are made upon the company's application, they derive their force solely from the orders of the regulatory body and not by force of agreement. If there could have been a contract as to rates, there was one in San Antonio. The provision in the franchise was that the company charge 5c. In 1917 the company petitioned the city to consent to consolidation of properties and the city consented by an ordinance "which expressly subjected the Public Service Company to all the

limitations, duties and obligations" which rested upon the Traction Company and the Gas & Electric Company (p. 550). The company accepted the provisions of the ordinance. The company later applied for an increase in rates above the 5c. The city claimed the company was bound by contract to the 5c fare and found as a fact that the hearing had shown no necessity for (p. 552) change in the rates. Suit followed, and motion to dismiss was filed (p. 552) as in the case at bar, on the ground that, whether or not the rates were confiscatory, the company was bound by contract to the 5c rate. The court overruled the motion to dismiss and the city answered asserting "an estoppel to deny the contract" (p. 553). The United States Supreme Court overruled this argument.

The city also argues that if no contract was possible that "would bind the city not to lower the rate, . . . nevertheless it was a unilateral contract or condition resulting from the granting of the franchise which bound the railway company to the franchise rate" (p. 556). As to this the court said there was no attempt consciously to produce such a condition, **"But besides, the error underlying the proposition is not far to seek"**. That the duty of the government to regulate by fixing a reasonable rate was interdependent and reciprocal with the duty of the company to charge only a reasonable rate, that the **supposed condition operating upon the private owner would be nugatory, that it was resolved into the mere exercise by government of its regulatory power.** (p. 556).

The court then set out that the city proceeded upon assumption that, because the city exacted as a condition

for its consent to consolidation that the existing obligations should be preserved, a contract as to the 5c fare arose. The error was equally apparent, said the court. In the case at bar, the rates set out in Section V of the ordinance of June 13, 1930, were arrived at after hearing before the council and appeal to the railroad commission in 1930 and still other hearings before the council. (R. 125). The city held lengthy hearings on the company's application, asserting the right of the city to give or not to give consent to a change of rate. The court then referred to "assumed restraint put by an existing contract", and held that limitations on the regulatory power were not to be implied.

In the case at bar petitioner argues that limitations are to be put upon the regulatory power, but it will be remembered that the state statutes authorize no limitation, qualification or curtailment of the regulatory power—but command express reservation. Every reason set out in the *San Antonio Case* is material and should have great weight, because the reasons have been time and time again reiterated and approved in many subsequent decisions, notably in the *Houston Case*, and in the *Los Angeles Case*, which are important cases in the United States Supreme Court.

The United States Supreme Court has also held that an agreement between a utility company in Texas and the city of Houston, Texas, as to the basis for fixing rates, is void and invalid as to both the city and the company; that such an agreement though accepted and acted upon did not amount to an estoppel and that neither party was bound.

In *Houston v. S. W. Bell Tel. Co.* (1922), 259 U. S. 318, involving the objection of the City that the utility was

bound by ordinance as to the basis for fixing rates, the court said:

"This ordinance contained the provision that the company 'agrees that it will not increase rates as at present charged by it for service in the city of Houston, unless it appears upon a satisfactory showing . . . that there exists a necessity for an increase of charges, in order that the said company may earn a fair return upon its capital actually invested in the Houston plant.'

"It is now contended by the city that the acceptance of this ordinance estops the company from asserting that the value of its plant, as of the date of the inquiry, and not the cost of it,—the 'capital actually invested,' shall be the basis for rate-making, but the company contends that the quoted provision of the State Constitution rendered the City incapable of contracting by such an ordinance, and that therefore, it is void and not binding on either party." (p. 320).

and

"The asserted reason for this contention is that the Merger Ordinance of 1915 and the acceptance of it by the Company did not constitute a contract binding upon either the city or the company, but that, though contractual in form, it was void under the provisions of the State Constitution and the decisions cited supra. In its answer the City avers that it did not and could not by that ordinance or otherwise, limit its rate-making power for the future. But, notwithstanding this agreement of the parties that the Merger Ordinance was void, the court held that the company, having accepted and acted upon it, was estopped to claim that it was not bound by its terms. Misrepresentation not being involved, mutuality was necessary to any estoppel growing out of this transaction, and, while thus asserting that the ordinance is void as to itself, the

city may not successfully assert that its adversary is bound by the acceptance of it. We think that neither party was bound by the ordinance and the acceptance of it, that the district court fell into error, and that the proper base for rate-making in the case is the fair value of the property, used and useful by the company, at the time of the inquiry." (p. 324).

It should be noted that the *San Antonio* and *Houston* decisions in the United States Supreme Court have been frequently cited, approved, and applied in the many subsequent opinions. In the case of *City and County of Denver v. Stenger* (1922), 277 F. 865 (Eighth Circuit Court of Appeals) a receiver, operating a utility, sought to enjoin the city of Denver from enforcing asserted rate contract and from interfering with the company in charging higher rates:

"It is claimed by appellant that the five-cent fare was a condition of the grant, and its acceptance created a binding contract on the part of the Tramway Company. It can be seen that this might be so as to some conditions of the grant, but as to the fares appellant claims that the city of Denver and the city and county of Denver were bound only until they desired to change the fares. These ordinances were not contractual in form, and, adopting the construction placed upon the same by the appellant, we do not see how they could be called contracts binding upon both parties.

"The appellant asserts that, while it cannot make a contract which shall suspend its power to regulate the fares to be charged by the Tramway Company, it could by granting the ordinance of 1885, 1888, and 1906, bind the Tramway Company for as long or as short a time as appellant might desire not to change the fares. If, however, the appellant can at

any time change the fares—in other words, refuse to be bound by contract—how does mere delay cure the lack of mutuality? A party to a contract is bound, or he is not bound, from the time of its execution. To say that a party is bound as long as he wants to be bound simply means that he is not bound at all. Upon the question of whether the parties to these ordinances intended to contract, and upon the question as to whether, if there was a contract, it would be void for want of mutuality, the following cases seem to us to be decisive against the claim of appellant.” (The court here cited numerous cases, including *Home Tel. Co. vs. Los Angeles*, 211 U. S. 265; *San Antonio Public Service Co. vs. City of San Antonio (D. C.)* 257 Fed. 467; *City of San Antonio vs. San Antonio Pub. Serv. Co.*, 255 U. S. 547; *Central Power Co. vs. City of Kearney*, 274 Fed. 253 Court of App. 8th Circuit Opinion filed July 13, 1921; *City of Dallas vs. Dallas Tel. Co. (C. C. A.)* 272 Fed. 410),

and

“We are of the opinion that the quoted provision of the Colorado Constitution, under the interpretations given similar provision in the Constitutions of the states of **Texas**, Missouri, and Louisiana, the Code of Iowa, and the statute of Nebraska, clearly prohibit the making of a contract suspending the power of the city and county of Denver or the city of Denver to regulate the fares of the Tramway Company. The history of the litigation in regard to the constitutional provisions of the state of Texas are to be found in *San Antonio Traction Co. vs. Altgelt*, 200 U. S. 304; *San Antonio Public Serv. Co.*, *supra*; *San Antonio Public Serv. Co. vs. City of San Antonio*, *supra*; *City of Dallas vs. Dallas Tel. Co.*, *supra*.”

In *Nebraska Gas & Electric Co. v. City of Stromsburg, Neb.*, 2 F. (2) 518 (8 C. C. A. 1924) by Sanborn, Circuit Judge, and Faris, District Judge, Lewis, Circuit

Judge, dissenting, the court held it to be inevitable that the contract was not mutual or binding alike upon both parties, approved the *Denver Case*, cited the case of *Houston v. Telephone Co.*, 259 U. S. 318, and reversed the district court with instructions to hear the counterclaim, and if proven, to enjoin the rates as confiscatory. In the case of *Central Power Co. v. Kearney*, 274 F. 253 (Eighth Circuit), arising in the State of Nebraska, Judge Sanborn was a member of the court, and strong reliance was placed upon the *San Antonio Case*, 255 U. S. 547.

Consideration will now, for the purpose of comparison, be given to United States Supreme Court cases that originated in **Illinois, Iowa, Florida, Minnesota and California**, wherein the principles set out in the Texas cases and in the United States Supreme Court cases that arose in Texas, were reiterated and fully sustained.

On the distinction between the power to contract as to a franchise and the power to contract as to rates a good discussion is found at page 598, in *Freeport Water Company v. City of Freeport* (McKenna 1901), 180 U. S. 587, arising in **Illinois**.

In *Southern Iowa Elec. Co. v. Chariton* (1921), 255 U. S. 539, the federal district court in **Iowa** had enforced franchise rates on the ground that they were contracts. The contention of the city of Chariton that rate contracts were enforceable was overthrown by the U. S. Supreme Court, per Mr. Justice White:

"The existence of a binding contract as to the rates upon which the lower court based its conclusion is,

therefore, the single issue upon which the controversy depends. Its solution turns, first upon the question of the power of the parties to contract on the subject, and second, if they had such power, whether they exercised it. As to the first, assuming, for the sake of argument only, that the public service corporations had the contractual power, the issue is, had the municipal corporations, under the law of Iowa, such authority?"

This excerpt is followed by approval and lengthy quotations by the U. S. Supreme Court of *Woodward v. Iowa R. Co.*, 178 N. W. 549, and *Ottuma R. Co. v. Ottuma*, 178 N. W. 905. In the latter case appears citation of the *San Antonio Case* (D. C.), 275 F. 467, by U. S. District Judge West. (p. 564). The U. S. Supreme Court held that there could be no valid contract as to rates in that state.

In a case arising in the State of **Florida**, *Ortega Co. v. Triay* (1922), 260 U. S. 103, the Court said:

"The case is in narrow compass. Its purpose is to enjoin appellee, as receiver of Jacksonville Traction Co. from collecting more than a particular fare, 5c, and compelling the specific performance of an alleged contract providing for such fare." (p. 104).

"To support this view, appellant presents a somewhat involved and elaborate argument. . . . And this, the further contention is, necessarily means the power to reduce, not to increase. In one direction only, is the contention, may the legislature modify rates, and 'that direction is down'". (p. 109).

"We think, however, the power to increase as well as decrease rates is an inevitable deduction from the reasoning of the cases." (p. 109).

In the case of *St. Cloud Pub. Service Co. v. St. Cloud* (1924), 265 U. S. 352, was presented an issue arising in **Minnesota** as to whether the ordinance constituted a contract as to rates, and the court held that the laws of that state permitted the city and the company to contract.

"It has long been settled . . . that the effect of such a contract (as to rates) is to **suspend** during its life, the governmental power of fixing and regulating rates. . . . The existence of a binding contract . . . is, therefore, the controlling issue upon which this controversy depends. Its solution depends upon whether the city had the power to contract on this subject. . . . Was the city authorized to enter into a contract as to the rate to be charged for fuel gas?" (p. 356).

"And where a municipality has both the power to contract as to rates and also the power to prescribe rates from time to time, if it exercises the power to contract, its power to regulate the rates during the period of the contract is thereby **suspended**, and the contract is binding." (p. 360).

"The city, clearly, could not avail itself of this statute to reduce the gas rates below the maximum prescribed in the contract of 1905; and the company conversely, cannot under it obtain higher rates."

It should be noted that the power that existed in **Minnesota** is totally absent in the state of **Texas**.

In **California**, seventy-three franchises providing that the "rate of fare . . . shall not exceed 5c" were involved in the important and thoroughly considered case of *Railroad Com. v. Los Angeles Ry. Corp.* (1929), 280 U. S.

145. There were still other franchises but it was by the court assumed that the 5c fare applied over all lines. The utility had applied to the Railroad Commission of California for a 7c fare, but its application was denied. The U. S. Supreme Court said:

"The sole controversy is whether the company is bound by contract with the city to serve for the fares specified in the franchises, it being conceded that the finding below respecting the inadequacy of the 5c fare is sustained by the evidence." (p. 151). "This court is bound by the decisions of the highest courts of the state as to powers of their municipalities. Our attention has not been called to any California decision, and we think there is none, which decides that the state legislature has empowered Los Angeles to establish rates by contract. This court is therefore required to construe the state laws on which appellants rely . . ." (pp. 151, 152).

The Court, referring to the *California Civil Code* (March 21, 1872), said:

"... Section 497 (of the Civil Code) authorizes political subdivisions to grant authority for the laying of railroads in streets '**under such restrictions and limitations' as they may provide.** Stat. 1891, p. 12. **This is too general.**" (p. 153).

The Court then referred to the *Broughton Franchise Act* and said that it

"nowhere expressly empowers the city to establish rates by contract. This court in the *Home Tel. & Tel. Co. Case* dealt with the quoted provision. It said, (p. 275):

'Here is an emphatic caution against reading into the act any conditions which are not clearly

expressed in the act itself. . . . It cannot be supposed that the legislature intended that so significant and important an authority as that of contracting away a power of regulation conferred by the charter should be inferred from the act in the absence of a grant in express words. But there is no such grant.' "

The Court, referring to an *Amendment of June 8, 1915, to the Broughton Franchise Act*, said:

"And, so far as concerns the matter under consideration, the Act was not expanded by the Amendment of June 8, 1915. It authorizes grantors of such franchises to impose such additional terms and conditions, 'whether governmental or contractual in character', as in their judgment are in the public interest. This general language does not measure up to the rule earlier invoked here by Los Angeles and applied by this court in the *Home T. & T. Co. Case*."

The appellants also invoked the City Charter of Los Angeles, (*Statutes of California, 1913*), quoted in the margin at 280 U. S. 155:

"The city . . . shall have the right and power: To grant franchises . . . for furnishing . . . transportation . . . or any other public service; to prescribe the terms and conditions of any such grant . . ."
(Stat. 1913, p. 1633).

As to these statutory provisions, "grant franchises" and "prescribe the terms and conditions of any such grant", the court said:

"But it requires no discussion to show that they are not sufficient to empower the city by contract to establish rates". (p. 155).

The conclusion of the United States Supreme Court was:

"Appellants have failed to sustain their contention that the city was empowered to make such rate contracts." (p. 156).

Los Angeles, under its special charter, had the power to grant franchises and "to prescribe the terms and conditions of such grant"; whereas Texarkana, Texas, under its special charter, has the power to grant franchises which "shall contain all the terms and agreements", but "it must expressly set forth that the council shall have the power and privilege of . . . fixing rates." (R. 165, 166).

Mr. Justice Brandeis, in his dissenting opinion in the *Los Angeles Case*, made this statement:

"In *So. Iowa Elec. Co. vs. Chariton*, 255 U. S. 539, a case coming from Iowa, it was held, following Iowa decisions, that, since the city lacked power to bind itself, there was no contract. And there is a statement to that effect in *San Antonio vs. San Antonio Pub. Serv. Co.*, 255 U. S. 547, 556." (p. 163).
 "But in *Southern Utilities Co. vs. Palatka*, 268 U. S. 232, the question was expressly left open." (p. 163).

It should be noted that the powers of the city of Palatka, Florida, since it had no power to regulate rates, are significantly different from those of the city of Texarkana, Texas, as it does have the power to regulate. The court, in the *Palatka Case*, 268 U. S. 232, expressly stated:

"There is nothing in this decision inconsistent with *So. Iowa Elec. Co. vs. Chariton*, 255 U. S. 539; *San Antonio v. San Antonio Pub. Serv. Co.*, 255 U. S. 547, and *Ortega v. Triay*, 260 U. S. 103."

CONCLUSIONS.

The conclusions to be drawn from the foregoing case are plain, and decide the case at bar. The rate-making power and contracting power are inconsistent and incompatible and the two cannot co-exist; the legislature having imposed upon the city council of Texarkana, Texas, the duty to make rates the contracting power as to rates is precluded; the rate-making duty is likewise inconsistent with and prevents any abridgment, suspension, surrender or barter by contract or otherwise. Section IX of the franchise is therefore wholly void.

Respondent is not estopped from asserting the invalidity of Section IX, *San Antonio Case*, supra, and public policy requires that it assert such invalidity in order to be able to maintain its properties, its present high standard of service, and in general its duties of a public nature.

It should be noted that the respondent utility serves approximately 200 cities, towns, and communities on its entire system and that its problem in maintaining high standards of service and in charging a fair price for its services are not confined only to Texarkana, Texas; the unit for ratemaking is the city no matter how many towns are served, and each city must stand on its own feet; if insufficient revenues are obtained in the city of Texarkana, Texas, the utility will not be allowed to recoup its losses by charging increased rates in other cities and towns served by it, *Wabash Valley Elec. Co. v. Young*, 287 U. S. 488.

This being true, it is difficult to see why the city of Texarkana, Texas, feels it would benefit from compelling the utility to charge rates so low as to be confiscatory.

While there may be a temporary benefit through reduced rates, the detrimental effect on the service and the loss in the efficiency of the Texarkana system would be greater to the customers than their saving through the rates. If reparations are to be made under Section IX, where are they coming from? The return at Texarkana, Texas, already being insufficient, is the Texarkana plant going to borrow the money to make these refunds, or will the other towns be expected to bear the expense of paying the Texarkana customers their refunds? The company is under a duty to maintain adequate depreciation reserves for the purpose of maintaining the efficiency of its property and the daily wear and tear and decay occurring thereon. Can the company maintain such reserves, pay its operating expenses, the interest on borrowed capital, and at the same time make the refunds and stand the cut in rates here demanded? All of these questions are matters which go to the very heart of the company's public policy as well as public policy to be construed by the courts.

The "public" that the utility is serving is the **whole body of customers** in the 200 cities and towns on its whole system and it is totally unfair for Texarkana, Texas, to demand a special privilege and rate not enjoyed by the other cities and towns served simply because of a provision inserted in the franchise.

The rates now being charged in Texarkana, Texas, are among the lowest in the United States, and nothing but harm can come from a further reduction in rates and further confiscation of defendant's property and business. Thus, we submit that not only is the law wholly on defendant's side, but sound public policy as well.

(C)

The rates set out in Section V of the Ordinance of June 13, 1930, are controlling.

Respondent, from the time the rates were prescribed by the city council of Texarkana, Texas, in Section V of the ordinance of June 13, 1930, to the present time, has collected in Texarkana, Texas, only the rates prescribed and set out in said Section V and has followed and applied them exclusively (R. 142, 143, 233). Said rates were prescribed after hearing, as confessed by petitioner's motion to dismiss in the district court. Said Section V, quoted in the statement of the case, *supra*, and found at R. 13, sets out that a hearing as to the rates which shall be charged, was had. The facts as to its enactment are found at R. 124, 125.

Respondent on November 3, 1933, filed application for increased rates and pursued it until the administrative remedies thereon were exhausted without avail. The city council on January 23, 1934, passed an ordinance setting out its refusal to exercise its regulatory power (R. 432) and denying the application because of its refusal to waive and insistence upon the provisions of the ordinance of June 13, 1930 (R. 285-322), but directing the city attorney to pursue the litigation in the courts to enforce compliance with petitioner's interpretation of Section IX (R. 320-321). The ordinance also gave notice that the city would one year later enter upon a hearing to determine whether or not a rate-reducing order should not be made (R. 321). No such hearing has been had, and no rate-reducing order was made. Under these circumstances respondent contends that petitioner has no cause of action to recover retro-

active reparations, nor does it have any present cause of action to reduce the existing rates. On the other hand respondent contends that it was and is entitled to a judicial trial on its allegations that the existing rates, or any less rates, are so low as to be confiscatory, which for the purpose of this case is confessed by petitioner's motion to dismiss.

Aside from respondent's right to contest the rates, respondent contends that the rates set out in Section V are final, conclusive, and uncontrovertible, and that respondent should not be forced to make reparations, nor to reduce the existing rates without notice, hearing and a rate-reducing order in due course for the future.

Petitioner's contention was just this; on November 16, 1933, petitioner filed suit in the district court of Bowie County, Texas, alleging that by the franchise ordinance of June 13, 1930, respondent was bound

"to supply gas at the rates granted and established therein. Said portion of said franchise granting such rates is contained in Section V of said ordinance," (R. 5).

Respondent had on November 3, 1933, applied for increased rates, but the city countered this by its suit. However the city council, later on, denied respondent's application by order dated January 23, 1934 (R. 285, 322), on the ground that respondent was barred by the ordinance of June 13, 1930. Respondent in its answer to the suit resisted the enforcement of the Section V rates or any lower rates. The order of January 23, 1934, also notified respondent that one year later the city of Texarkana, Texas,

would enter upon a hearing for the purpose of determining whether or not the rates should be reduced (R. 321). But no hearing was entered upon at the time indicated, nor at any time since.

A good statement of the rule as to rates fixed by regulatory bodies in the states, particularly in Texas, is contained in concurring opinion (Circuit Judge Hutcheson) in *Eagle Cotton Oil Co. v. Southern Ry. Co.* (1931, C. C. A. 5), 51 F. (2) 443, at page 446:

"Under their systems their Commissions make their rates, and until set aside by the courts they are final and conclusive on carrier and shipper alike.

"In the state of Texas, for example, the law requires, not the carriers, but the Commission to establish reasonable rates. . . . Unless upon a timely suit the rates are found unreasonable, they are by law made uncontrovertible as between carrier and shipper, *Missouri-Kansas & T. R. Co. vs. Railroad Commission* (Tex. Civ. App.) 3 S. W. (2) 489; *Producers' Refg. Co. vs. Missouri K. & T. R Co.*, (Tex. Com. App.) 13 S. W. (2) 679. . . ."

It is also well settled by the Supreme Court of Texas that the statutes of the State of Texas deprive the utilities of the power to make rates and confers that authority upon the regulatory body, *Railroad Commission v. Weld & Neville*, 96 Tex. 405, 73 S. W. 532, per Justice Brown.

Petitioner's argument is that the rates set out in Section V are maxima rates and therefore subject to repa-rations. This argument is claimed by petitioner at p. 66 to be supported by *Community Natural Gas Co. v. Natural Gas & Fuel Co.*, 34 S. W. (2) 900, a case of competing gas

companies (opinion by the Court of Civil Appeals) but even a casual reading of that case shows to the contrary. This case is discussed by respondent, *infra*. However it should be pointed out that petitioner's quotation at p. 68 is misleading. It was the rates of the community company and not of the fuel company, which were designated as maxima. The court said:

"Whether the rates of the fuel company were fixed or merely maxima is not necessary to decide."

The rates set out in Section V of the ordinance of June 13, 1930, were clearly not maxima rates. But even if they could be assumed to be maxima, it does not follow that respondent, where it charged such rates only and no higher than those rates, can be forced to make retroactive reparations. Said Section V rates having been prescribed after a hearing and having been duly authorized can not be upset *per stirpes ab initio* and abrogated so as to entitle petitioner to hark back to the very inception of said rates and upset them initially, root and all.

The facts were that a schedule of rates for application in Texarkana, Texas, had been passed by the city council of Texarkana, Texas, on March 13, 1923. After making very substantial improvements in the system, respondent attempted to secure an increase in gas rates in Texarkana, Texas, by filing an application for change in rates in the first part of 1930. On this application the city council held hearings but denied the application. Respondent then appealed to the railroad commission of Texas. The railroad commisison came to Texarkana and conducted hearings upon the appeal. In the meantime the

city council of Texarkana, Texas, opened new proceedings in the city council and held further hearings, which resulted in the city council's prescribing the schedule of rates which is set out in Section V of the ordinance of June 13, 1930. The railroad commission approved the new schedule. Later, on June 17, 1930, respondent accepted the ordinance of June 13, 1930, which embodied the new schedule and has at all times since charged those rates and those rates only. (R. 124, 125). Respondent pleaded that Section V prescribing said rates as aforesaid was in pursuance of the power of the city council over rates.

As no change in rates has been made in Texarkana, Texas, since June 13, 1930, it is submitted that the rates prescribed in Section V of the ordinance of June 13, 1930, are not subject to retroactive reparation and are not subject to reduction until after the city council in due course of procedure shall have made a rate-reducing order that is valid.

(D)

Cases cited by petitioner not in point.

Petitioner cites and quotes the case of *Dallas Railway Co. v. Geller* (1925) 114 Texas 484, 271 S. W. 1106. This case lends no color to the claim that although the city has no power to contract as to rates so as to bind the city, it does have power to contract as to rates so as to bind the company, nor does it lend color to the claim that the city can surrender or delegate its regulatory power in whole or in part. This case, in holding against the plaintiff who sought to enjoin the company from raising its rates to 6c from the alleged contractual 5c rate designated as the max-

imum fare in the franchise, sustains the position of the company in the case at bar. The court at p. 1107 said:

"With this construction as limited and defined in the case last cited we are in accord. We incline to the view that the Honorable Court of Civil Appeals intended to go no further than to hold in accord with the above mentioned case of *San Antonio Tr. Co. v. Altgelt* (Tex. Civ. App.) 81 S. W. 106, in which this court refused a writ of error, and with the Supreme Court of the United States in the same case (200 U. S. 304, 26 S. Ct. 261, 50 L. Ed. 491), and the other cases cited above, wherein it was held that a rate schedule as in this case is subject to legislative control within the limitations of the Constitution and the laws which control the rights of property. This holding in this case in no wise contradicts the holding in the case of *Mayor et al. v. Houston Ry.*, 83 Tex. 548, 19 S. W. 127, 29 Am. St. Rep. 679.

"The right or power to further control or regulate the grant in regard to the rate schedule is a reservation to the municipality, and not an inhibition to contract; and where a franchise is accepted by a grantee, this reservation provided in the law becomes a part of the contract."

The rate schedule in Dallas was held to be in the legislative control, which had been delegated to the city; the plaintiff was held to have no right to prevent the company from raising its rates above the alleged contract rates, and the rates were held reserved under the regulatory power of the city.

As to certain matters other than rates, the city and the company can make a binding contract in granting franchises; but in the *Geller Case* it was held that rates remained subject to the regulatory power; that they were

subject to revision from time to time by the council which was vested with that legislative function; and that of this function the city could not divest itself. While the "power to further control or regulate the grant in regard to the rate is a reservation to the municipality", it "was not an inhibition to contract." The distinction, the court pointed out, was:

"This holding in no wise contradicts the holding in the case of *Mayor et al. v. Houston Ry.*, 83 Tex. 548, 19 S. W. 127."

In this *Houston Railway Case*, it was held that, as to certain provisions, which were quite different from rate provisions, the franchise was a binding contract which could not be subsequently impaired by the authorities of the city of Houston; that the city of Houston was bound by contract not to interfere with the company in laying a track on one of the streets of the city.

The court in the *Geller Case* accordingly affirmed the district court in dismissing the suit to prevent the railway from raising its rates above the franchise rates which were alleged to be enforceable as contract rates insofar as the company was concerned. The net result was that, although as to certain conditions and provisions a franchise could be a contract, as to rates it could not be a binding contract, as the power to regulate was reserved; and that where a franchise is accepted by a grantee, "this reservation provided in the law becomes a part of the contract."

The result of the authorities is that the power and duty of the council to fix reasonable rates for the purpose of protecting the utility's property from confiscation

through inadequate rates is just as surely a part of the police or governmental power and duty as is the power and duty to lower the rates to protect the consumers, if the rates are too high. The city cannot bind itself not to regulate rates, nor can the company bind the city not to regulate rates; neither party can bind the city not to regulate rates; the statutory power and duty of the city to regulate rates in accordance with the requirements and methods laid down in the statutes cannot be impaired or altered except by another statute; its power to prescribe reasonable rates is a duty and power of which the city cannot divest itself and of which the company cannot divest the city. It is reserved by law regardless of what the city does or what the company does. Any attempt of the city to bind the city or the company not to recognize, follow, obey or call upon governmental power is fruitless, since said power is inalienable, and the city government is under a duty to exercise its police power, following the methods prescribed for its exercise, including all others. If the city could divest itself of the governmental power to protect the company against confiscation, it would be tantamount to a surrender of its governmental function. This position is in entire harmony with the *Geller Case*.

Petitioner states that after the company had filed its original brief in the *Geller Case*, the case of *Uvalde v. Uvalde Elec. & Ice Co.*, 250 S. W. 140, was handed down, and that it was then urged as a decision that a city with the power to regulate rates could not make a contract as to rates which would bind either the city or the company, which is precisely what the *Uvalde Case* held. Moreover, the court in the *Geller Case*, did not disapprove, but, sus-

tained the position of the company, protecting the company in raising its rates above the rates to which the company was alleged to have been bound by contract. No criticism or qualification whatever was made of the *Uvalde Case*. On the contrary the *Uvalde Case*, as shown in subdivision (b), supra, has been frequently cited and approved in many cases, one of the late cases being *Texas Gas Utilities Co. v. City of Uvalde*, 77 S. W. (2) 750, 752.

The city of Dallas, under special charter, and the city of Uvalde, under the general laws, both had the power to make franchise contracts with utilities. In fact, franchises have been made in all cities in Texas incorporated under the general laws. In cities having rate regulatory power under special laws, as well as in cities having such power under general laws, such as Uvalde, there is the limitation that, as to rates, the city has no power to make a contract which is binding on either party. This matter can in no instance be surrendered but is reserved under the police or governmental power of regulation in accordance with the statutory requirements. The *Geller Case* so held.

The attempted distinction, between the *Uvalde Case* and the *Geller Case*, on the ground that the city of Dallas had been **expressly authorized** to grant franchises, is unsound because Uvalde also had the same power to grant franchises. Neither in Dallas nor in Uvalde does the power to grant franchises include the power to contract as to rates, or to make the rates in another state and jurisdiction control and govern the Texas rates. The same reasons, upon which the *Uvalde Case* and the *Geller Case* are founded, are controlling in the case at bar.

This case at bar is even stronger because the special statute applicable to Texarkana, Texas, mandatorily requires the regulatory power to be specifically stipulated in the very terms of the franchise; the franchise, if it should so expressly stipulate, is required to be read, just as though the stipulation was expressly written therein.

The case of *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, cited by petitioner, was rendered by Mr. Justice Holmes. The holding was that the city was not bound by the asserted contract, but could reduce the rates. There was no holding that the company was bound by a contract as to rates; that issue was not involved. The company had not applied to increase the rates, but was insisting upon the rates as a contract. The court held that the rate contract was not valid, did not prevent a reduction. Petitioner is the party undertaking to abrogate the regulatory power exerted in Section V of the ordinance of June 13, 1930, to divest it in an unauthorized manner, to delegate it to an extra-territorial body, and to abdicate its own inalienable functions.

Petitioner cites the case of *Texarkana Gas & Elec. Co. v. City of Texarkana* (Tex. Civ. App.) 123 S. W. 213. In that case the Court of Civil Appeals set out that the city had existed as a municipality under the general laws of the state and had granted a franchise; that in 1907 the state statute granted to the city a special charter; that the city thereafter passed an ordinance to regulate the placing of poles and to provide for a license and license fee upon each pole. It was held that regulation of the placing of poles

was valid, but that the license and license fee provisions were invalid. The court said:

"As a defense the appellant alleged and proved upon the trial that some years before the granting of the special charter to the city of Texarkana, and while the latter was existing as a municipal corporation under the general laws of the state, it obtained from the city a franchise or right which authorized it to place and set its poles on the streets and alleys of the city, and that by virtue of that authority it had placed and set its poles on the streets and alleys, and was using and maintaining them in that position at the time the ordinance above mentioned was passed, and that the appellant was then and is now acting by virtue of the original franchise referred to. It was also shown that in the grant of the franchise claimed the terms required the appellant to furnish free of charge electric lights for use in the city hall, fire-house, and jail, and to furnish electric street lights at certain prices agreed on, and that no other license fees were therein exacted." (p. 214).

Petitioner, referring to that part of the opinion relating to free electric lights for use in the city hall, fire house and jail, contends that the court held that the company had to furnish free service. That question was not in issue in the above Texarkana case, but it was involved in the *Uvalde Case* (Com. of Appeals, 250 S. W. 140). In this latter case adopted by the Supreme Court of Texas, the Commission of Appeals held, that, as to what the city shall pay for street lights, the regulatory power must be exerted upon application; that the alleged contract was not valid; that the company could raise its rates, if confiscatory.

The court in the *Texarkana Case*, 123 S. W. 213, further said:

"In granting the right, or franchise as it is called, the city can impose conditions or charge a fee for the privilege given, which the applicant can accept or reject at his pleasure; but, having accepted it, he takes the franchise subject to the conditions imposed, and must pay the consideration enacted. *3 Abbott, Municipal Corp., para. 908.*"

This statement refers to conditions, other than a condition as to rates; it is immediately qualified by the statement that "such transactions have many of the elements of a contract",—not all of them however, because only "within certain limitations" can "the city part with its police power." The city cannot surrender that portion of its police power, the exercise of which is essential to the general welfare in protecting personal and property rights." It cannot surrender those that "involve the surrender of its necessary governmental functions." As the state statute in force in *Texarkana* expressly reserves the rate regulatory power from franchise contracts, how can it be said that the city is authorized to violate it as a condition of granting a franchise?

When the state statute in force in *Texarkana* forbids the city to surrender any part of its governmental power over rates, it is vain to contend that, under certain conditions, the city can surrender part of said regulatory power and duty; that its governmental power can be surrendered insofar as concerns the company. Such partial surrender is claimed on behalf of the consumers, but the city is forbidden to absolve itself, and the company cannot bind itself or the city to override the state statute; the

power and duty of the council is not to be abridged, suppressed, suspended, surrendered, or placed in abeyance.

In the statute pertaining to Texarkana, the rate regulatory part of the police power is in effect made "essential to the promotion of the general welfare in protecting personal property rights"; the statute is mandatory. The rate regulating power must be expressly excepted in the very terms of all franchises and, if any franchise should not contain such express stipulation, it shall be considered and read just as if such stipulation were expressly written therein.

No qualification authorizes the city to surrender its power and duty. The governmental power and duty is not limited to exertion only in behalf of consumers. The city, the consumers, and the company cannot, jointly or severally, contract what the sovereignty of the state prescribes shall be reserved.

As to other matters, there can be contractual relations and binding terms and conditions, but since rates have been excepted and excluded by statute, franchises cannot contract them. The court in the *Texarkana Case*, 123 S. W. 213, then said:

"The terms upon which the right was granted fixed only the contractual relations of the parties; and the easement—that which the city could grant—became vested."

Thus the city could grant the franchise and certain terms of the franchise were binding as it has many elements of a contract, but "the city could not surrender that portion of its police power the exercise of which is essen-

tial to the promotion of the general welfare in protecting . . . property rights." Since rate regulating and prevention of confiscation is protecting property rights, the city of Texarkana in the case at bar has no power to surrender or qualify its regulatory power.

The case of *City of Terrell v. Terrell Elec. Light Co.* (1916) by the Court of Civil Appeals, 187 S. W. 966, cited by petitioner was not a rate case and does not sustain petitioner's contentions. Even if it did it would not be proper to follow it in view of the cases by the higher Texas Courts, and in view of the *Houston Case*, 259 U. S. 312 (1922) and the other cases cited in this brief. The court held that certain provisions were not conditions. Certainly Section IX in the case at bar was not a condition.

Petitioner cites the case of *Athens Tel. Co. v. City of Athens* (1914), 163 S. W. 371, by the Court of Civil Appeals on a temporary injunction. The court said the city was free to regulate the local telephone business, and yet the utility in proposing to increase its rates without so much as applying to the city for authority to do so, was totally ignoring the regulatory power. Another appeal was taken from the final judgment (1916), 182 S. W. 42, to the Court of Civil Appeals. It was pointed out that the city had no regulatory power over telephone rates. Neither did any other body have such regulatory power. It was purely a matter of contract.

Petitioner cites the case of *Greenville Tel. Co. v. City of Greenville* (1920), 221 S. W. 995, by the Court of Civil Appeals. It is not shown that any regulatory body had been vested with regulatory power, but the franchise

contained such a provision. It is universally settled in Texas that a franchise cannot vest a city with regulatory power. But the telephone company in the *Greenville Case* did not so much as attempt any administrative relief. On the other hand, if there were no regulatory body, it is settled that the franchise provisions will prevail.

Petitioner cites the case of *Texas Tel. Co. v. City of Mart* (1920) 226 S. W. 497, by the Court of Civil Appeals. The court clearly pointed out that the city had no regulatory power, and that the franchise will prevail under such circumstances, though not in that case. There is no holding that a city or a company can make a valid contract as to rates where the city has regulatory power, nor that such an attempt would be paramount to the regulatory power, nor that it could delegate or abdicate such power to another city.

The case of *Fink v. City of Clarendon*, 282, S.W. 912 by the Court of Civil Appeals, cited by petitioner, was a telephone case in a town incorporated under general laws. This case is different from the case at bar, in that the city of Clarendon, being under 2,000 population, had no power to regulate rates. The railroad commission likewise had no power to regulate telephone rates then or now. In such situation it was held that the city of Clarendon had power to grant the franchise and agree upon rates, which were binding upon both the city and the company, until such time as the legislature should regulate or authorize regulation of the rates. This case is founded on the case of *Southern Utilities Co. v. Palatka*, 268 U. S. 232, which expressly holds that it is not incon-

sistent with the *San Antonio*, *Chariton*, and *Ortega Cases*. The *Fink Case* is quite different from the *Uvalde*, *Geller*, *San Antonio*, *Houston* and *Los Angeles Cases*, and from the case at bar; in these cases, said cities were delegated the power to regulate rates, as well as the power to make franchise contracts. If such cities could contract as to rates, it would suspend or surrender its regulatory power in violation of the law. The court cited the *Uvalde Case*, 250 S. W. 140, by the Com. of Appeals (judgment affirmed by the Supreme Court of Texas) but did not disapprove of it in any respect.

The old case of *Cleburne Water, Ice & Lighting Company v. City of Cleburne*, 1896, (Tex. Civ. App.) 35 S. W. 733, decided 42 years ago by a Court of Civil Appeals, is strongly relied upon by petitioner. The facts were that the operator of the utility undertook to raise its rates in the city of Cleburne without even applying to the city council of Cleburne. The city contended that the operator was bound by the existing rates until its city council should authorize different rates.

"Hence the provision authorizing the city council to fix rates, with the limitation as to other cities, which limitation was for the protection of Moss against the fixing of rates by the council at less than those of other cities of like character in the state. He evidently was willing to abide by the Bell rates, but, when the council undertook to change, it would not go below other cities of like size and population." (p. 735).

If the laws in force at that time were like those of the present times, which they are not, and if the city of

Cleburne had regulatory power like that now in force in Texarkana, Texas, which it did not have, the above excerpt is clearly unsound. Cities in Texas having regulatory power are not bound by a contract as to rates; this is admitted in petitioner's brief. However, the *Cleburne Case* assumes that the contract as to rates was valid and binding alike on both the city and the utility. No issue was raised as to the validity of the contract. The issue was merely one of intention and interpretation of several instrument. The powers of the city of Cleburne are not shown, though petitioner asserts that the city of Cleburne reserved a right and privilege it did not already have. As the city council had not been called upon by the operator for changed rates, the franchise rates were the proper rates, whether or not the city council of Cleburne was vested with regulatory power. If the 1896 opinion of the court of civil appeals could be interpreted as contended by petitioner it would have little weight as a precedent today, either under like facts and like laws, or under different facts and different statutes. The important recent cases in the higher courts of Texas do not so much as cite the *Cleburne Case*.

In 1896 there was no statute vesting the city council of Cleburne, or any other body, with regulatory power conditioned that the city council shall not prescribe any rate which will yield less than 10% per annum net on the physical properties, equipment and betterments (Art. 1119 originally enacted in 1907, relating to cities of over 2,000 population incorporated under general laws of the state), nor a statute directing that a city having regulatory power under a special charter shall base rates upon the

fair value of the property of the utility (Art. 1124 passed in 1921); nor that the franchise should expressly reserve the regulatory power from all franchises.

If the Cleburne opinion were to be construed to hold that a franchise ordinance was a contract as to rate, valid as to both the city and the utility, preventing a city from exercising its regulatory power to fix rates lower than those in certain other cities, the opinion would be clearly unsound.

It does not appear however that the opinion even so much as referred to an issue as to whether a city having regulatory power may make a valid contract as to rates; nor the issue whether a city, after a hearing fixing a rate can validly contract that the rates specifically fixed by it shall vary according to future contingencies, or conditions in another city; nor was there any discussion of the settled principle that a city having regulatory power by state statute must fix rates in the method laid down by the statute and not otherwise.

Petitioner cites the case of *Southern Utilities Co. v. City of Palatka, Florida*, 268 U. S. 232, but the court expressly stated:

"There is nothing in this decision inconsistent with *So. Iowa Elec. Co. v. Chariton*, 255 U. S. 539; *San Antonio v. San Antonio Pub. Serv. Co.*, 255 U. S. 547, and *Ortega v. Triay*, 260 U. S. 103."

The point is that Palatka, Florida, had no regulatory power. The *Los Angeles Case* (1929) 280 U. S. 145, discussed in respondent's brief, is clearly the applicable rule in the case at bar. The law applicable in Florida un-

der circumstances similar to those in the case at bar is shown in *Ortega Co. v. Triay*, 260 U. S. 103, quoted by respondent, *supra*.

In the case of *Peoples Gaslight & Coke Co. v. City of Chicago*, (1904), 194 U. S. 1, cited by petitioner, there was no issue of confiscation. The issue was whether the city had the right to regulate and the court held it did. The court said the Act of 1897 was not intended to fix and did not fix a rate unalterable by either party. It is a hornbook law that the state under the circumstances of that case could regulate rates, and could vest the city with the regulatory power. The company undertook to enforce an asserted rate contract in suppression of the regulatory power, which of course it could not do. There was no attempt by the company to raise its rates and no issue as to what the situation would have been if such attempt had been made.

Petitioner cites the case of *Cedar Rapids Gas Light Co. v. City of Cedar Rapids, Iowa* (1912), 223 U. S. 655. The significant quotation on page 53 of petitioner's brief is that the regulatory power was not to be abridged by ordinance, resolution, or **contract**. Mr. Justice Holmes said:

"The state court assumed that there was no contract in the case."

and

"It would require a very clear case to warrant the reversal of the decree of a state court, which, though final in form, merely postpones a decision upon the merits for further experience",

and that the return would be over 6 per cent.

When the question in Iowa came up later in a real way, the U. S. Supreme Court decided it in a real way in a leading case per Chief Justice White. See *Southern Iowa Elec. Co. v. Chariton* (1921) 255 U. S. 539, quoted and strongly relied upon by respondent, *supra*. The *Los Angeles Case* (1929), 280 U. S. 145, is also quoted and strongly relied upon by petitioner.

The case of *Henderson Water Company v. Corporation Commission*, 269 U. S. 278, cited by petitioner is not at all similar to the case at bar. The city had no regulatory power and the laws of North Carolina are not entirely different from those of Texas.

Petitioner cites two Arkansas state cases, *Bolinger v. Watson*, 187 Ark. 1044, 63 S. W. (2) 642, and *Wiseman v. Phillips* 191 Ark. 63, 84 S. W. (2) 91, but the laws of Arkansas as to the validity of its legislative acts and constitution are surely different from and not governed by the defined powers and limitations by the Texas statute of the city of Texarkana, Texas.

Judge Hutcheson, the organ of the court below, is a Texas lawyer, a distinguished member of the bar of that state prior to his elevation to the bench of the United States District and Court of Appeals, thoroughly versed in and familiar with the jurisprudence of that state. The opinion purports not to depart from the local law of Texas but to exactly follow and be ruled thereby. It is not likely that it did not achieve its avowed purpose or that it so signally failed in its statement and construction of the applicable Texas decisions.

Judge Hutcheson was the organ of the court in the case of *City of Seymour v. Texas Elec. Serv. Co.*, (1933), 66 Fed. (2) 814, cited in the opinion under review, R. 428. Judge Hutcheson also was thoroughly familiar with the case of *Community Natural Gas Co. v. Natural Gas & Fuel Co.*, by the Texas Court of Civil Appeals (1930), 34 S. W. (2) 900, for he cited it in his opinion at 66 F. (2) 816.

And yet petitioner in effect contends that he misapplied said two cases and cites them to upset the decision below, which of course they do not. The *Community Gas Co. Case* does not disapprove, but cites the important *Uvalde Case*, 250 S. W. 140. Petitioner significantly omits from its quotation the following sentence in the *Community Natural Gas Company Case*:

"Whether the rates of the fuel company were fixed or merely maxima is not necessary to decide."
(p. 902).

Petitioner also omits the following:

"Rate making is a legislative, not a judicial, function (*Missouri-Kansas & T. R. Co. of Texas v. R. R. Comm.* (Tex. Civ. App.) 13 S. W. (2) 489), affirmed (Tex. Com. App.) 13 S. W. (2) 679; and the rate-making power here involved is vested exclusively in the city of Brownwood, with the right of appeal to and trail de novo by the railroad commission, and a further limited right of review by the district courts of Travis County (R. S. arts. 1119, 6058 and 6059). The controversy between the two competing corporations is one which addresses itself in the first instance to the city of Brownwood, and not to the courts. Under the holding in the *Uvalde Case* the city is not only vested with the power, but is charged with the duty of fixing just and reasonable rates, both in the interest of the contending utilities and

in that of the consumers. As was said in *Economic Gas Co. v. Los Angeles*, 168 Cal. 448, 143 P. 717, 718, Ann. Cas. 1916A, 931; 'It is contended that the city's police power extends only to the protection of the consumer, But "regulation" involves more than that. It includes the power to prevent ruinous competition among the producers as well as unjust charges to the consumers.' " (p. 903).

Petitioner quotes a part of the opinion relating merely to the Community Company. The case is entirely different from the case at bar and does not support petitioner's contentions. Neither does the *Seymour Case*, which was written by Judge Hutcheson, support petitioner.

Petitioner also cites the case of *Parsons v. City of Galveston*, (1935) 125 Tex. 568, 84 S. W. (2) 996. To show in what high regard for knowledge of Texas law Judge Hutcheson is held, it is noted that this high court quoted Judge Hutcheson at p. 998 and again at p. 999 in the *Seymour Case*, and also at p. 1000; and said:

"In considering cases dealing with the regulation of rates of public service utilities operating under franchises, it must be remembered that such utilities are operating under certain vested rights obtained through their franchises. While their rates are subject to regulation, they have obtained the right to carry on their business and occupy the city's streets for such purposes under a franchise right to do so, which cannot be destroyed through means of fixing rates whether maximum or minimum, the effect of which is to confiscate their property by making it impossible to carry on their business with hope of a reasonable return. In other words, the power to regulate their rates may be qualified or limited by their vested right to conduct their business under

their franchises. That, as the authorities cited above establish, is not true as to persons engaged in a business such as that of plaintiffs in error, who have no vested rights in the use of the streets for their business, and hence the privilege they seek is not protected from destruction. They stand upon an entirely different footing from the utility possessing rights under a franchise, consequently the result of a rate regulation upon their privilege to use the streets does not have the same legal effect as it would have were the vested rights of a public service utility involved." (p. 1001).

(E)

The city council in taking jurisdiction and in holding hearings on the merits of the rates, abrogated and waived Section IX.

Respondents on November 3, 1933, filed application for increase in rates (R. 285). The council stated that it did not waive the provisions of the franchise contract and that it entered into the hearing and considered the evidence for the purpose of determining whether or not the facts were such as should cause the council to consider the provisions of the franchise agreement to be so oppressive that the council should in equity and good conscience consent to waive the same (R. 287). The council made findings of fact (R. 287-319), and again stated that it refused to waive and still insisted upon the provisions of the franchise agreement (R. 319-320), and would not then change the rates, but that it would a year later enter upon a hearing for the purpose of determining whether or not it would change the rates to 40c. (R. 321). Respondent pleaded the full facts and they are to be considered as the facts in

the case at bar as they were confessed by petitioner's motion to strike out.

Section IX was pleaded by respondent to be unenforceable and invalid on numerous grounds, including the same grounds set forth as to the invalidity of Section VIII-A (R. 156), one of which is the defense of waiver of the city council by its actions in calling upon respondent to go through a complete rate case, and in having full hearing, and acting upon respondent's application, etc., consuming great time, effort and expense of respondent, and in holding itself out as willing to consider the matter upon its merits and in considering the matter but denying it for the reasons given. (R. 159).

This ground is based on the opinion of the United States Supreme Court in *Railroad Commission v. Los Angeles R. Corp.*, 280 U. S. 145 at 156, *et seq.* The company in that case applied for increased rates and although the commission granted a small increase, it never went into effect and was not accepted by the company. The company dismissed its application. Thereafter, the company filed another application. The commission took jurisdiction, the United States Supreme Court held as the second main point in the case that "assuming the fares were established by the franchise contracts, we are of the opinion that such contracts have been abrogated". (R. 156).

It is submitted that even on the assumption that Section IX were ever a valid contract as to rates, the actions of the city council are the material circumstances on which to judge the effect of what it did, and that, by those actions, the city council abrogated and waived Section IX.

(F)

**Asserted discrimination does not make
Section IX valid.**

Petitioner takes the position that Section IX should be held valid on its allegation that it is a "non-discrimination" agreement. The non-discrimination claim is unsound in fact as it is in theory when it is seen that what petitioner really seeks is to enforce discrimination and to compel respondent to furnish gas at confiscatory rates. Petitioner's argument is in effect that it matters not how unjust the rates may be, how insufficient the compensation given the company for gas service, that, nevertheless, by virtue of Section IX, Texarkana, Texas, should be given an advantage over other Texas cities similarly situated otherwise, but not having the same franchise provisions.

Respondent denied there was any unlawful discrimination. As petitioner's motion to strike out was sustained and respondent's pleadings stricken, it is to be taken that the allegations of respondent set out the correct facts. It should be stated here that petitioner's claim of discrimination was not sustained by either the district court or by the Court of Appeals.

However, petitioner argues that discrimination is a ground on which this court should enforce Section IX and the city's interpretation thereof, adjudge reparations, and reduce the rates in Texarkana, Texas, below those that were lawfully prescribed by the city council of Texarkana, Texas, in Section V of the ordinance of June 13, 1930.

As a matter of fact, the difference in the rates charged in the two cities for the period under review has been in favor of Texarkana, Texas, and against Texarkana, Arkansas. While for two and one-half months the rates in Texarkana, Texas, were for a short temporary period somewhat higher than those in Texarkana, Arkansas, there was a period of nearly three years during which the rates in Texarkana, Texas, were considerably lower than those in Texarkana, Arkansas. Not on the merits or reasonableness of the rates, but on technicalities as to procedure in litigation in Arkansas, respondent temporarily charged in Texarkana, Arkansas, rates which were somewhat lower than those that were charged in Texarkana, Texas, in accordance with Section V of the ordinance of June 13, 1930, in that city, but this situation lasted for only two and one-half months from December 1, 1933, to February 16, 1934. This short temporary period in Arkansas ended on February 16, 1934, the date on which a temporary injunction was issued in a new suit which had been filed in Arkansas as soon as legal procedure would permit. On February 16, 1934, new rates (R. 154) were placed into effect in Texarkana, Arkansas, which were considerably higher than the Section V rates in Texarkana, Texas. These new rates continued in effect in Texarkana, Arkansas, from February 16, 1934, to December 4, 1936, nearly three years. The difference in rates did not constitute unlawful discrimination, but if it were discrimination, it was in favor of Texarkana, Texas, for this period of nearly three years, and that city could hardly complain. In December, 1936, the district court in Arkansas in part dissolved the injunction and in part made it perpetual. As to the part dissolved, respondent took an appeal to the Eighth Circuit

Court and secured supersedeas as to reparations. As part of the injunction was dissolved, respondent pending the outcome of the appeal adopted in December, 1936, in Arkansas, rates which were lower than the Section V rates in Texarkana, Texas. The city of Texarkana, Texas, admitted:

"So far as the rights of the consumers in Texarkana, are concerned, the court cannot now pass upon them from and after February 16, 1934. If the gas company is successful in its Arkansas suit, then there will have been no discrimination from and after February 16, 1934."

On the other hand, if respondent should lose its appeal in Arkansas, petitioner asks that it be permitted to go back and upset, the rates prescribed in Texarkana, Texas, in Section V of the ordinance of June 13, 1930, from the very day it was passed—in other words, it would be abrogated *ab initio*, without ever having had any operative force whatever even for one instant of time and petitioner seeks to recover \$150,000.00 reparations for the past eight (8) years. Surely no such uprooting of the ordinance and consequent catastrophe to respondent is sustainable.

Petitioner seeks to have the court put into force in Texarkana, Texas, the Arkansas rates, which are confessed, by the motion to strike out, to be confiscatory. In the face of the unvarying jurisprudence that federal courts will not make, find, or establish rates, plaintiff is asking the court to establish these Arkansas rates in Texarkana, Texas, and to award reparations.

The argument of the city that the prescribed rates in Texarkana, Texas, are discriminatory is in the face of

the leading cases in Texas, which are those cited by Judge Hutcheson (in the *Eagle Cotton Oil Company Case*, 51 F. F. (2) 446): *Missouri, Kansas & T. R. Co. v. Railroad Commission* (Tex. Civ. App.) 3 S. W. (2) 489, and *Producers' Refining Co. v. Missouri, Kansas & T. R. Co.* (Tex. Com. App.), 13 S. W. (2d) 679. The opinion in the Court of Civil Appeals, 3 S. W. (2d) 489, by Chief Justice McClen-don, was described in the Commission of Appeals as "the able opinion". The facts were that the railway company opposed reparations claimed by shipper on account of alleged discrimination, based on the ground that specified rates from certain origin points of shipment in Texas to certain delivery points in Texas, which had been until 1921 the same as the rates from the same origin points to the delivery point at Shreveport, Louisiana, were reduced to 25c by the railway company insofar as concerned shipments to Shreveport, but were not reduced insofar as concerned shipments to the Texas points. The Railroad Commission contended, that while it was undoubtedly a recognized principle of rate making that a mere difference in rates does not always constitute an unjust discrimination, these exceptions must be based on sound reasons if they are free from discriminatory charges; that the railway company violated the law prohibiting unjust discrimination to the extent that the rates to the Texas delivery points exceeded 25c; and that reparations based on such rate were recoverable. The position of the railway company was sustained by the Court of Civil Appeals, the Commission of Appeals, and the Supreme Court of Texas. The rates complained of, having been prescribed by the Commission and not having been attacked as provided by law, were held to be binding on both the carrier and the shippers, and not violative of, but in conform-

ity to, the rates fixed under the law. The rate-making power having been vested in the Commission, and the carrier having charged only the rates fixed by the Commission, reparations were denied.

"As tersely expressed by Associate Justice Brown in *Railroad Commission v. Weld & Neville*, 96 Tex. 405; 73 S. W. 532:

"The Railroad Commission Law deprived railroad companies of the power to make rates and conferred that authority upon the commission. . . ." (3 S. W. (2) 493).

"In the state act, as pointed out above, the rate-making power is taken away from the carrier altogether and vested exclusively in the commission. . . ." (*Id.* 495).

"The holding of the commission that the Wichita Falls rates, though approved by it, were in fact made by the carriers, because made upon their application, is unsound. Rates, to be effective under the Texas act, must be made by the commission, and are inoperative other than by force of the commission orders." (*Id.* 496).

This case was affirmed by the Supreme Court of Texas, 13 S. W. (2) 679, 682.

Squarely on this point is the following quotation of *Texas Gas Utilities Co. v. City of Uvalde* (San Antonio Court of Civil Appeals, Dec. 24, 1934), 77 S. W. (2) 750:

"Article 6057 expressly provides that **different rates may be charged in different places**, and the fact that appellant had a different rate at La Pryor or Carrizo Springs, or some other city, would not give a district court the legislative power of fixing rates for the city of Uvalde." (p. 751).

A mere difference in rates between two cities similarly situated does not in itself justify the conclusion that one is too high and one is too low. Particularly is this true where the cities involved come under the laws of two separate and different sovereignties. The comparable factor which must be considered in making the comparison may be differently viewed by the rate making bodies of the two sovereignties concerned. The differences in taxes, governmental relations, operating conditions in the two cities will cause a wide difference in rates. Few conditions and circumstances are the same as between the two cities of Texarkana, enumeration of the differences being set out at R. 153. Each city must be treated as a separate unit for rate making; losses at one city can not be made up by increased earnings at another. *Wabash Valley Elec. Co. v. Young*, 287 U. S. 488. Respondent contends that petitioner is not entitled to inflict the loss that would be suffered at Texarkana, Texas, under the rule petitioner contends for. Such a rule would not be good law, would be a frightful distortion of public policy and is so unconscionable as to lack even good morality.

In *Smyth v. Ames*, 169 U. S. 466, the United States Supreme Court, in answer to the assertion that local rates in Nebraska were higher than in Iowa, pointed out, that on an issue of discrimination between rates in Nebraska and Iowa, the necessary factors were the kind and amount of business and the cost thereof, which varied in the several states:

"The volume of business in one state may be greater per mile while the cost of construction and maintenance is less. Hence, to enforce the same rates in both states might result in one great injustice,

while in the other it would only be reasonable and fair. Comparisons, therefore, between the rates of two states are of little value, unless all the elements that enter into the problems are presented . . . Hence, a mere difference of 40% between the rates in two states is of comparatively little significance." (p. 540).

There is a review of this subject in *Ft. Smith Light & Traction Co. v. City of Ft. Smith, Arkansas*, 202 Fed. 581, 589, 590.

It is argued by petitioner that part of the majority opinion of the Court of Civil Appeals in the case of *Dallas Power & Light Co. v. Carrington*, 245 S. W. 1064, quoted supra under sub-division (B), supports its claim to put the Arkansas rates into effect in the city of Texarkana, Texas, and to recover reparations on the ground of alleged discrimination: whereas no reparations were recovered in that case and the issue of discrimination in the *Carrington Case* is significantly different from that in the case at bar, and the facts in the case at bar are confessedly different. The city of Highland Park, "having the power by general statute to regulate public utilities, had not granted any franchise or passed any legislation relating to light service or rates." (p. 1047).

"On June 1, 1920, appellant divided into districts the territory supplied by its plant, making the town of Highland Park one unit and the city of Dallas another. It continued to supply the city of Dallas at the old rate in accordance with the terms of the franchise, but it raised the rate in Highland Park." (p. 1047).

No ordinance was passed by the city council of Highland Park until October 14, 1920, when it enacted an ordi-

nance adopting the same rates that were effective in Dallas and that had been effective in Highland Park from 1917 to June 1, 1920. The court, after holding this ordinance to be void, took up the issue of discrimination and found that the old 6c rate was still voluntarily continued in effect in Dallas and in Munger Place, Jimtown, Oak Cliff, Oak Lawn, Mt. Auburn, and Sunset Hill, while Highland Park was charged an average of about 10½c, that it cost no more to supply its citizens with electric current than it cost to supply the other places just named, that the conditions in Highland Park were similar in respect to distance, number of feeders, and cost, that the facts in that case showed discrimination. It is noted that the increased rates were purely company made rates and that they were put into effect in Highland Park by the utility company without so much as making any application whatever to the city council of Highland Park in which was vested the regulatory power, that the company had no authorization to increase its rates in Highland Park, but that its action was opposed. The court further held as a fact that it was possible for the company to treat all users of the plant equally and at the same time be sufficient to produce 10% on the actual cost as required by statute, that the facts in the case constitute discrimination on the part of the company against Highland Park, and that the 10% return could be made without discrimination. (P. 1050). On the issue of discrimination there was a dissenting opinion by Dohoney, Special Judge. (p. 1050). He found the evidence to be that the 6c rate did not produce sufficient income in Highland Park, that appellant had the right in view of the facts disclosed by the record to classify its consumers and charge different rates to each class as they were not similarly

situated, and that the evidence did not show discrimination. (p. 1052). A writ of error granted in that case was dismissed. (p. 540, Vol. 28, Texas Digest of 1936, published by West Publishing Co.).

Where there are different regulatory bodies, it is very difficult, if not impossible, to secure uniformity of rates even under identical facts, as strikingly illustrated by the United States Supreme Court in *Mitchell C. & C. Co. v. P. R. R. Co.*, 230 U. S. 247 at 255, 256:

"The necessity under the statute of having such questions settled by a single tribunal in order to secure singleness of practice and uniformity of rate has been pointed out and settled in *Abilene*, *Pitcairn*, and *Robinson Cases*, and is referred to here because this record and that in *Pennsylvania R. Co. v. International Coal Mine Co.*, just decided, furnish a striking illustration of the results which would follow if the reasonableness of an allowance could be decided by different tribunals. Both cases involve the payment of 18 cents a ton to the *Altoona Company* during the same period and for identically the same reasons. In both the plaintiff insisted that the payment was a rebate and the carrier that it was compensation for services rendered. In the *International Case* the judge treated the *Altoona* allowance as lawful and reasonable. In this case the referee found that it was a rebate, while the trial judge * * * held that it was a question of fact about which the evidence was conflicting and thereupon approved the referee's report. Treating it as a question of fact, there may have been sufficient testimony to sustain the finding in both instances, although the conclusion was **diametrically opposite.**" (pp. 255, 256)

Gas rates in Texas are unmistakably placed in the control of Texas regulatory bodies to be regulated in the

manner and methods prescribed by Texas statutes. The Constitution of Texas itself provides for prevention and punishment of "the demanding and receiving or collection of any and all charges, as freight, wharfage, fares, or tolls, for the use of property devoted to the public, unless the same shall have been specially authorized by law." (Art. XII, Section 4 quoted *supra* and at R. 168). In the city of Texarkana, Texas, respondent has at all times charged only the rates that were prescribed by the city council of Texarkana, Texas. These prescribed rates were mandatory and were the only lawful rates. However, respondent in 1933 applied to the city council of Texarkana, Texas, for change in rates, the same as the change that was applied for by respondent before the city council of Texarkana, Arkansas. And respondent has done all it could to secure the changes in each city. If rate differences in Arkansas for the short period during which rates were lower than in Texas, could be held to be discriminatory,

"* * * an alternative must be afforded. The offender or offenders may abate the discrimination by raising one rate, lowering the other, or altering both * * *. The situation must be such that the carrier or carriers if given an option have an actual alternative." *Texas & P. R. Co. v. United States*, 289 U. S. 627, 650, 651 (1933).

Differences in rates do not constitute unlawful discrimination, but, assuming for the sake of argument that there had been any past discrimination by the company, **there is no law authorizing the recovery of refunds by gas consumers who have paid only reasonable rates.** In *Penna. R. Co. v. International Coal Min. Co.*, 230 U. S. 187, 200, a discrimination case, the shipper argued that, if it could

not recover as claimed, "the statute not only gives no remedy, but deprives the plaintiff of the right it had at common law to recover this difference between the lawful rate (that was paid) and the unlawful rate." The court said:

"We are cited to no authority which shows that there was any such ancient measure of damages, and no case has been found in which damages were awarded for such discrimination." (230 U. S. 200),

and that the Interstate Commerce Act either first created a right in such case to recover damages, or removed the doubt as to whether such suit could be brought; that the English Courts had held a shipper who paid a reasonable rate to have no cause of action where the carrier had charged a lower rate to another; that no part of the payment of lawful rates can be treated as an overcharge; that having paid only the lawful rate, plaintiff was not overcharged, though the favored shipper was undercharged; that for such undercharge the federal statute provided a fine payable to the government and gave to other shippers the right to recover such damages, if any, as were proven and "known to the law"; that illegally making an undercharge to one shipper did not license similar undercharges to other shippers; that such other similar undercharges would be additional crimes, and, in the example cited, would give the shipper "a profit on the carrier's crime," or amount to ten times the first undercharge, or \$35,000.00 on one undercharge of \$3,500.00. Compare with the case at bar, where for refunds of \$60,000.00 on the Arkansas side, the Texas side seeks some \$150,000.00. The same rule obtains in *Texas Railroad Commission v. Weld & Neville* (Tex. Sup. Ct.), 73 S. W. 529, 532.

(G)

Section IX is invalid and not a bar to judicial hearing and relief from confiscatory rates.

That the rates set out in Section V of the ordinance of June 13, 1930, or any less rates, are and were confiscatory of respondent's property was one of the defenses pleaded by respondent in each of its answers and counterclaims, and was confessed by petitioner's motion to strike out. This plea, as set out in respondent's separate answer and counterclaim, covers 18 pages of facts (R. 189-207), all of which are confessed by petitioner's motion to strike out. When the matter was before the city council, lengthy hearings were held, its order denying increased rates consisting of 36 pages (R. 285-321).

This plea of confiscation was made in defense to petitioner's suits as well as in counterclaim. This was required in the second paragraph of *United States Supreme Court Rule No. 30*, providing that the answer "must state . . . any counterclaim" arising out of the transaction. Even if the counterclaim should be considered an independent suit in equity, it was proper to set it up under Rule No. 30. It appears however to come under the mandatory part of said rule. It also appears to be within the rule that when a court of equity has jurisdiction over a cause for any purpose, it will retain it for all purposes and proceed to a final determination of all matters in same. Pomeroy, 4th Edition, Sections 181, 231 et seq.; *Harr v. Pioneer Mechanical Corporation* (2 C. C. A., 1933), 65 Fed. (2) 332, 335.

The *Johnson Act* (28 U. S. C., Sec. 41, as amended, May 14, 1934, C. 283) does not apply to oust a defense to the subject matter sued upon and initiated by a city, nor does it apply to pending suits.

As conceded by petitioner's ~~motion to strike out~~, respondent did everything possible to obtain administrative relief, though handicapped and interrupted by petitioner's suits. As respondent was and is suffering daily confiscation, it was at all events entitled to a judicial hearing, and yet petitioner is affirmatively enforcing confiscation.

That the regulatory power cannot be suspended or held in abeyance, as attempted to be provided by Section VIII-A is clearly shown in the authorities and argument. See particularly the case of *City of Uvalde v. Uvalde Elec. & Ice Co.*, 250 S. W. 140, and respondent's pleadings as to Section VIII-A set out from R. 158 to and including R. 162.

While petitioner at first pleaded Section VIII-A as valid, it later contended that it had become moot (R. 158). The district court held the section to be valid but moot, as more than a year passed after respondent gave notice (R. 236). If Section VIII-A should be assumed to be valid, it would be construed to mean that respondent, after said year's notice, would be entitled to increase its rates if the facts justified. (R. 159). And it is undeniable that the facts do justify, as they are well pleaded (R. 189-207) and confessed by petitioner's motion to strike out.

The only reason the district court denied respondent a hearing was on the ground that Section IX prevented it.

Even if Section IX should be held as contended by petitioner, it should not be permitted to subject respondent to confiscatory rates. By no means would it so subjugate respondent for all time.

Petitioner at p. 18 makes a misleading argument regarding a bond in the railroad commission; the reference (R. 367) given by petitioner is to the answer and counterclaim filed July 12, 1934, whereas this was amended by respondent's Separate Amended Answer and Counterclaim filed July 14, 1937, R. 122-225; see specifically R. 161, 178, 179, 180, 183, 184. The latest pleadings clearly governs. But petitioner's brief in this court fails on this point to give the amended allegations, which are confessed by petitioner's motion to strike out filed July 19, 1937, R. 228-231, on which final decree was rendered in the trial court.

Petitioner in its second suit also made the Railroad Commission of Texas parties defendants (R. 264-283), alleging that the Railroad Commission should be enjoined

"from entertaining said appeal and from hearing the same and from taking any action thereon and from taking any action with reference to gas rates in the city of Texarkana, Texas, until after said Southern Cities Distributing Company has complied with the provisions of said franchise agreement calling for one year's notice," (R. 272)

and that respondent be enjoined "from prosecuting or taking any further steps in its appeal which had been lodged with the Railroad Commission of Texas." (R. 281).

The record is as follows:

Respondent's pleadings in the district court, which were confessed by petitioner's motion to strike out, were:

"Defendant denies that on March 12, 1934, the Railroad Commission of Texas made an order allowing said appeal on condition that the company give bond in the sum of ten thousand (\$10,000.00) dollars; denies that the Railroad Commission ordered that the action of the city council of January 23, 1934, be suspended or superseded on the filing and approval of such bond. The bond required by the Commission related to an altogether different resolution; to the resolution of December 12, 1933, which was admitted by plaintiff was not a rate-reducing order and of which the Railroad Commission had no jurisdiction."

"Defendant denies that Section VIII-A of the ordinance of June 13, 1930, constitutes a valid and binding waiver by defendant of any right it may have under the statutes of the State of Texas to seek and secure an increase in rates; denies that Section VIII-A is valid; denies that it is necessary to give one-year's notice before an increase in rates should be applied for; denies that the attempt to secure an increase in rates by appeal to the Railroad Commission is in violation of any valid provision of the ordinance of June 13, 1930; denies that defendant waived its right to secure increased rates, except one-year's notice of its intention to apply for same; denies that the Railroad Commission is without jurisdiction of the appeal from the order of January 23, 1934; denies that the Railroad Commission is without power over said appeal. . ." (R. 129, 130).

"Defendant pleads that plaintiff has no cause of action to prevent defendant from pursuing the procedure to increase the prescribed rates, nor to enjoin defendant's appeal to the Railroad Commission

and never had such a cause of action, but the effect of what it did blocked the procedure. Plaintiff alleges that statutes of Texas

'provide that pending the hearing before the city council said increased rates should not be placed into effect, and in the event of an appeal, they should not be placed in effect until the appeal should be passed upon by the Railroad Commission.' " (R. 160)

"Article 6058 of Revised Civil Statutes of Texas, of 1925, is construed by the decisions of Texas to provide that where the utility seeks to increase existing rates, the increase cannot be put into effect with or without bond until the commission makes its final order on appeal from refusal of the council to allow the increase. Without notice or hearing, the Railroad Commission of Texas refused to act on defendant's application for a temporary order superseding the existing rates, pending final hearing. The Railroad Commission of Texas has jurisdiction of the appeal from the order of the council dated January 23, 1934, refusing to grant defendant's application of November 3, 1933, but refused to recognize or act upon the appeal at all unless defendant complies with a provision for a certain bond relating solely to the Resolution of December 12, 1933, which the Commission may not legally require. (R. 161)

"The Statute of Texas is construed to require that the existing rates continue in *statu quo* and be not increased until final disposition of the case before the Commission, does not afford an adequate remedy; is invalid as so construed by the courts of Texas; is violative of the due process and equal protection of law clauses of the Fourteenth Amendment to the United States Constitution; requires enforcement of rates that are daily confiscatory until such time as the Commission makes final disposition

which may take from a few months to many months; in the case at bar it is taking years. Defendant alleges that on such appeal the Railroad Commission, unless it can grant supersedeas, is required by law to hear such appeal without requiring the posting of supersedeas bond; and the action of the Railroad Commission in refusing to proceed to hearing is erroneous and contrary to law and deprives defendant of the hearing it is entitled to from said Railroad Commission and of substantial rights. Under such circumstances defendant has the right to maintain its action to charge the rates it applied for in the city council or to fix its own rates, to prevent daily confiscation of its property; defendant ask that the Court sustain this right. Defendant has taken all the steps open to it under the Texas statutes as far as it could." (R. 162)

"The city council on December 12, 1933, in the absence of defendant, its attorneys, witnesses, or representatives and without notice to defendant and without hearing, passed a resolution which referred to a decree in a suit of Southern Cities Distributing Company vs. The City of Texarkana, Arkansas, in the United States District Court for the Western District of Arkansas, dated December 1, 1933, discussed *infra*." (R. 176-177).

"The Resolution of December 12, 1933 is a nullity, invalid and of no force, it was passed without notice to the defendant and without evidence or a hearing; it was passed in only one reading, the city charter requiring three separate readings on three separate meetings; because there was no publication as required by the city charter; there were failures in other points to comply with the city charter, such as the title, style and caption, emergency, non-reference to committee, no reporting back; passage on the same day of introduction; failure to record proper vote. The only action of

the city council concerning a reduction of rates after notice and hearing is the Resolution of January 23, 1934, which gives notice that the city council would on January 23, 1935, enter into a hearing concerning the reduction of rates in Texarkana, Texas.

"Regarding said Resolution of December 12, 1933, plaintiff in its brief states:

'The resolution of the Council shows on its face that it was taken in view of and to secure performance of the franchise agreement of the company, and was not taken under the powers conferred on the Council as a rate regulating tribunal.'

'This was simply the action of one party to an agreement calling upon the other party to carry out its obligations and directing that suit be brought if such other party refused. It does not purport to be the order of a rate regulating tribunal, made after formal notice and taking of testimony.' (p. 24).

and,

'We know of no statute or decision which holds that where a gas company, or any other utility, makes an agreement with a city as to rates or any other matter, than that the City Council may not direct that company to carry out and perform its agreement, or may not direct that suit be brought to compel it to do so, without first giving the company formal notice and opportunity to be heard. The only question for decision was whether the City should insist on the performance of an obligation voluntarily entered into by the gas company. A mortgagor is not entitled to a hearing before the mortgagee calls on him to pay or before the mortgagee orders a foreclosure in the event of non-payment. The maker

of a note to a bank is not entitled to formal notice and a hearing before the board of directors of the bank before the bank calls on him to pay or orders suit if he fails to pay.' (p. 25).

"Plaintiff quoting Article 6058 Revised Civil Statutes of 1925, states:

'All of this is a description of an appeal from an order of a regulatory tribunal. A resolution of a city council calling upon the company to carry out an agreement to reduce rates is not a *decision, regulation, ordinance or order* reducing rates. What the legislature evidently intended was to provide a review for the actions of the Council as a rate making tribunal, . . . not to subject its franchise agreements to a review by the Commission.' " (p. 27, italics are the plaintiff's). (R. 178-180).

"Defendant, when appealing on March 5, 1934, from the Council's Order of January 23, 1934, denying increased rates, out of caution took the necessary steps to appeal from said Resolution of December 12, 1933, if it were appealable. If said Resolution of December 12, 1933, had been legally passed and were a rate-reducing ordinance within the scope of Article 6058 Revised Civil Statutes of 1925, the petition of plaintiff insofar as based upon said Resolution would be premature. But defendant understands that plaintiff grounds its asserted reparation solely upon Section IX of the franchise ordinance of June 13, 1930, and upon alleged discrimination, and not upon said Resolution of December 12, 1933. Since the Resolution was illegally and improperly passed and since it is conceded not to be a rate-reducing ordinance, the Railroad Commission had no jurisdiction thereof, and the attempted appeal is non coram iudice. The bond referred to by the Railroad Commission which pertains only to

said resolution, is unauthorized for this and other reasons shown *infra*." (R. 180)

"The City did all it could to prevent defendant proceeding with the appeal; on April 21, 1934, it filed in the Railroad Commission Motion to Dismiss the Appeal, or, in the alternative, on account of the injunction and suit, that all further proceedings in the Commission be abated until such time as the litigation in the United States District Court for the Eastern District of Texas should be finally disposed of.

"Defendant undertook to proceed in the Railroad Commission and requested that plaintiff's motion to dismiss the appeal be set for hearing and action, but so far its efforts to get any action at all have been unavailing.

"The Commission made no order, except a provision as condition precedent, shown by its pleadings herein for a certain \$10,000.00 bond concerning the Resolution of December 12, 1933, only, and will not act on either of the appeals unless such bond is filed, although the bond was referable only to the order of December 12, 1933. The Commission was and is without legal authority to require bond as to the order of January 23, 1934, and did not attempt to require bond as to such order; the bond named in its order was totally inapplicable thereto; it was also erroneous and inappropriate even to the order of December 12, 1933, above described. Defendant has not filed such bond, but nevertheless expected to prosecute its appeal and would have done so, if it had not been prevented as herein shown. The appeal from the Resolution of January 23, 1934, was from a denial of an application for increased rates; the provision for increase in rates pending the appeal was made, nor could be made under Texas decisions; defendant did not elect to make said bond." (R. 183-184).

The statute governing appeals to the Railroad Commission is as follows:

Article 6058, Revised Civil Statutes of Texas, 1925,
provides in part as follows:

" . . such municipal government shall determine said application within sixty days after presentation unless the determination thereof may be longer deferred by agreement. If the municipal government should reject such application or fail or refuse to act on it within said sixty days, then the utility may appeal to the Commission as herein provided. But said Commission shall determine the matters involved in any such appeal within sixty days after the filing by such utility of such appeal with said Commission or such further time as such utility shall in writing agree to, but the rates fixed by such municipal government shall remain in full force and effect until ordered changed by the Commission."

Petitioner cites *Box v. Newson* (Court of Civil Appeals) 43 S. W. (2) 981, and contends in its brief that the company's only remedy is to bring an independent suit to mandamus the railroad commission to act, although the city prevented the company from proceeding in the railroad commission (R. 183). Respondent contends that **such collateral lawsuit** and such extended efforts to exhaust state legislative remedies are not required.

In *Pac. Tel. & Tel. Co. vs. Kuykendall* (Taft, 1924), 265 U. S. 196, the telephone company had filed a schedule of rates with the Department of Public Works increasing the rates to be charged. The increased rates were suspended, but later denied supersedeas. The company

sought relief in the federal court, but the court dismissed the bill on the ground that the company had not exhausted state legislative remedies. The U. S. Supreme Court found, that the state court of Washington was part of the valuation tribunal with power to set aside the valuation made by the Departments, and to make a new one; that such review by the state court of the findings of the Department was in a legislative capacity. The court held that as supersedeas was denied the legislative remedy in the state court did not have to be exhausted before resort to the federal court.

In Texas the state legislative remedy in the case of gas rates is in the city council with review by the Railroad Commission, the Railroad Commission is the final legislative body, *Railroad Commission v. Weld & Neville* (Tex. Sup. Ct.) 229 S. W. 301; *Mo. Tex. Tel. Co. v. Sherman*, 4 Northern Sup. 554; *Railroad Com. v. Uvalde* (Civ. App.) 49 S. W. (2) 1113; *M. K. & T. Ry. Co. v. Railroad Com.* 3 S. W. (2) 489, 13 S. W. (2) 679; while in Washington state, the legislative remedy, as shown above, is in the department with review by the state court in a legislative capacity; the state court is the final legislative body. The Railroad Commission in Texas, therefore, occupies a situation like that occupied in Washington state by the state courts.

In case a utility in Washington state seeks to increase rates which have been in force for more than one year, the state statute provides that no supersedeas shall be allowed pending final determination of the appeal in the state court, the final legislative body. Under such circumstances, the fact that the final legislative remedy in the

state court has not been concluded will not prevent a federal court from exercising jurisdiction.

So, in the case at bar in Texas where the company seeks to increase its rates, the state statute as construed by the state court provides that no supersedeas shall be allowed pending final determination of the appeal in the Railroad Commission, the final legislative body. *Harris v. Municipal Gas Co.*, (Tex. Civ. App. 1933) 59 S. W. (2) 355, reads:

"In the hiking of the rates, however, the utility seeks to better the contract under which it has been willing to work. In such case the presumptions were against it and the Legislature, we believe, saw fit to require that it continue in statu quo until final disposition of its request."

The fact that petitioner prevented the Railroad Commission from acting will not prevent a federal court from entertaining jurisdiction of the case, and making such order as the facts justify if the rates are confiscatory as alleged and confessed.

Such circumstances in the case at bar are claimed by petitioner and apparently correctly, if it were not for the U. S. Constitution, to have the effect that respondent can have no relief whatever for the confiscation it is suffering and will continue to suffer. As to the past period from November 23, 1933, the date respondent asked for said rates to go into effect, until the present time, already some five years, confiscation has accrued in no small sum. And it will continue from the present time, until some future indefinite date. Respondent should not be deprived of the right to answer petitioner's suit. In the

case of *Prendergast v. New York Tel. Co.* (1922), 262 U. S. 43, the court said:

"Nor did the fact that the orders of the commission merely prescribe temporary rates, to be effective until its final determination, deprive the company of its right to relief at the hands of the court. The orders required the new reduced rates to be put into effect on a given date. They were final legislative acts as to the period during which they should remain in effect pending the final determination; and if the rates prescribed were confiscatory, the company would be deprived of a reasonable return upon its property during such period, without remedy, unless their enforcement should be enjoined. Upon a showing that such reduced rates were confiscatory, the company was entitled to have their enforcement enjoined pending the continuance and completion of the rate-making process. *Cumberland Tel. & Tel. Co. vs. Louisiana Public Service Commission*, supra. And see by analogy, *Oklahoma Natural Gas Co. v. Russell*, supra; and *Love v. Atchison T. & S. F. R. Co.*, 107 C. C. A. 403, 185 Fed. 321, 326, affirming 174 (50) Fed. 59 and 177 Fed. 493."

Pertinent also to the situation in the case at bar is the case of *Smith v. Ill. Bell Tel. Co.* (Sutherland, 1936), 270 U. S. 587, in which the court said:

"Property may be as effectively taken by long continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them; and where, in that respect, such a state of facts is disclosed as we have here, the injured public service company is not required indefinitely to await a decision of the rate-making tribunal before applying to a federal court for equitable relief.

The facts, which the motion to dismiss conceded, present a far stronger case for such relief than any of the cases with which this court dealt in *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, 293; *Prendergast v. New York Tel. Co.*, 262 U. S. 43, 49; *Pac. Tel. & Tel. Co. v. Kuykendall*, *supra*, p. 204; and *Banton v. Belt Line R. Com.* 268 U. S. 413, 415."

In *Oklahoma Natural Gas Co. v. Russell* (Holmes, 1923) 261 U. S. 290 the Commission had denied application of the gas company for higher rates. Oklahoma statutes provide an appeal to the state court which is a legislative proceeding wherein the state court has power to substitute a different rate and grant supersedeas in the meantime. The company had appealed to the state court and applied for supersedeas in order that it might put into effect the higher rates it had applied for, but supersedeas was denied. Thereupon, the company filed suit in the federal court. Relief was denied by the federal court under the *Prentis Case* on the ground that the proceedings in the state court, the final legislative body, had not been concluded. The U. S. Supreme Court, speaking through Mr. Justice Holmes, said:

"Coming to the principal question, if the plaintiffs respectively can make out their case, as must be assumed for present purposes they are suffering daily from confiscation under the rate to which they are now limited. They have done all that they can under the state law to get relief and cannot get it. If the Supreme Court of the state hereafter shall change the rate, even nunc pro tunc, the plaintiffs will have no adequate remedy for what they may have lost before the court shall have acted. *Springfield Gas & Elec. Co. v. Barker*, 231 Fed.

331, 335. In such a state of facts *Prentis v. Atlantic Coast Line Co.*, has no application. See *Love v. Atchinson, T. & S. F. R. Co.*, 107 C. C. A. 403, 185 Fed. 321, 324, 325. Rules of comity or convenience must give way to constitutional rights. In the case cited, there was no doubt as to the jurisdiction of the circuit court, but simply a decision that the bills should be retained to await the result of appeals if the companies saw fit to take them. 211 U. S. 232. The companies had made no effort to secure a revision and there had been no present invasion of their rights but only the taking of preliminary steps toward cutting them down. In such circumstances, it was thought to be more reasonable and proper to await further action on the part of the state.

"As in our opinion the district court had jurisdiction and a duty to try the question whether preliminary injunctions should issue, and as that question has not yet been considered the cases should be remanded to that court, with directions to proceed to the trial."

The principles set forth in the above cases of *Pacific Tel. & Tel. Co. v. Kuykendall* and *Oklahoma Natural Gas Co. v. Russell*, supra, were later expressly approved by the U. S. Supreme Court in *Porter v. Investor's Syndicate* (Roberts, 1932) 286 U. S. 461, where, however, a different result was reached because of a different situation. This case dealt with a controversy arising in Montana where the original legislative body is a Commissioner and where a legislative appeal is provided to the Montana state court, the final legislative body. The company in that case, contended that the fact that it had not first proceeded in the state court was not a bar to its suit in the federal court, on the ground that the state court, the final legislative body,

was forbidden by statute to grant interlocutory relief and supersedeas pending final decision. The U. S. Supreme Court held against the company and dismissed its suit because the state statute authorized a stay pending final decision and there had been no denial of supersedeas by the state legislative body; but the court, expressly recognizing that, if the state statute had not provided a stay, the company could have at once resorted to the federal court:

"But where either the plain provisions of the statute (*Pac. T. & T. Co. vs. Kuykendall*, *supra*) or the decision of the state court interpreting the act (*Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, 67 L. Ed. 659) precludes a supersedeas or stay until the legislative process is completed by the final action of the reviewing court, due process is not afforded, and in cases where the other requisites of federal jurisdiction exists recourse, to a federal court is justified." (286 U. S. 741).

In *U. S. v. Abilene & S. R. Co.* (Brandeis, 1924) 265 U. S. 274, the court said:

"First. The Commission moved, in the district court, to dismiss the bill on the ground that the suit was premature."

"But in the absence of a stay, the order of a division is operative; and the filing of an application for a hearing does not relieve the carrier from the duty of observing an order. Despite the failure to apply for a rehearing, the court had jurisdiction to entertain this suit. *Prendergast v. New York Tel. Co.* 262 U. S. 43, 48, 49. Compare *Chicago R. Co. v. Illinois Commerce Commission*, P. U. R. 1922C, 282, 277 Fed. 970, 974. Whether it should have denied relief until all possible administrative remedies had been exhausted was a matter which

called for the exercise of its judicial discretion. We cannot say that, in denying the motion to dismiss the discretion was abused."

It is submitted that respondent's answer, that the Section V. rates, or any less rates, are confiscatory, which is confessed by petitioner's motion to strike out, should not be overruled without a judicial hearing on the merits of the rates.

POINT II.

SECTION IX WAS INAPPLICABLE AND ITS CONDITION WAS NOT FULFILLED.

Section IX reads:

"If Grantee shall be finally compelled to, or should voluntarily, place in any rates in the City of Texarkana, Arkansas, less than the rates granted by this Ordinance then and thereupon the lessened rate shall apply in the City of Texarkana, Texas, and Grantee shall not be authorized or permitted to charge and collect any higher rate."

The Court of Appeals in the opinion under review said:

". . . That the decree should be reversed, both because the clause is completely invalid, and because, if valid and enforceable, it is without application here. . ." (R. 431; 97 F (2) 5, 9).

Respondent, defendant in the district court, pleaded amongst others, the following as to the application of Section IX:

"(t) It is too vague, obscure and uncertain to be applicable or enforceable; its meaning is not susceptible of ascertainment;" (R. 152)

"(u) If it could be applicable or enforceable as to any period of time, it is too vague and uncertain as to other periods of time;" (R. 153)

"(y) Because Section IX is incapable of any reasonable application. Plaintiff in its brief at p. 5 says:

'So far as the rights of the consumers in Texarkana, are concerned, the court cannot now pass upon them from and after February 16, 1934. If the gas company is successful in its Arkansas suit, then there will have been no discrimination from and after February 16, 1934.'

"The reason for this statement is that from February 16, 1934, to December 4, 1936, the rates in Texarkana, Arkansas, were higher than the rates charged in Texarkana, Texas. If defendant is successful on appeal to the U. S. Circuit Court of Appeals in the Arkansas suit, defendant will charge higher rates in Arkansas than the prescribed rates in Texas. The rates charged in Texarkana, Arkansas, from February 16, 1934, to December 4, 1936, were:

"\$1.75 for the first 1,000 cu. ft. of gas,

"\$.75 each for the next 2,000 cu. ft.,

"\$.55 each for the next 7,000 cu. ft.,

"\$.35 for each additional 1,000 cu. ft.

"From the statement of plaintiff above quoted, that 'the Court cannot now pass upon' the rates in Texarkana, Texas, 'from and after February 16, 1934,' and the statement that, 'If the gas company is successful in Arkansas suit, then there will have been no discrimination from and after February 16, 1934,' it would follow there would be, in Texarkana, Texas, from February 16, 1934, until some time in future, a *hiatus* in which no one would be able to say what have been the applicable gas rates in Texarkana, Texas, since February 16, 1934. The ground offered by the plaintiff for the

existence of such queer condition is that Texas rates are dependent upon the success or failure of defendant in the Arkansas suit. Such supposed impossibility, of determining, by any means within or without the State of Texas, what are the legal rates in Texarkana, Texas, illustrates the principle, that the City cannot delegate or surrender the regulatory power; that, where a power is granted and the method of its exercise prescribed, that method excludes all others and must be followed. If defendant shall be required to make reparations as to dates prior to February 16, 1934, it would necessarily be on the ground that prior to February 16, 1934, the 1923 Arkansas rate became applicable in Texarkana, Texas, and not the rate prescribed by the City Council of Texarkana, Texas, in Section V of the ordinance of June 13, 1930.

"If reparation or reduction should be required since February 16, 1934, or if defendant should be required to reduce its rates in Texarkana, Texas, and if defendant should be successful in the appeal in the Arkansas suit, the prescribed rates in Texarkana, Texas, would become again operative and judgment would have to be rendered against the gas consumers in Texarkana, Texas, in favor of defendant.

"If defendant should be required to reduce its rates in Texarkana, Texas, below the prescribed rates, and if the rates in force in Arkansas from February 16, 1934, to December 4, 1936, should be upheld in the Arkansas appeal, the rate in Texas would of and from said date be increased to those prescribed in Section V of the ordinance of 1930 automatically and retroactively, and without action of the City Council of Texarkana, Texas.

"On the other hand, if defendant should lose the appeal in Arkansas, the rates prescribed in 1930 in Texarkana, Texas, would under the claim of said

City, have had no operative force even for one instant. If reparation should be ordered, it would mean that defendant would have to pay out the difference between the revenues collected under the rates prescribed by the City Council of Texarkana, Texas, and the calculated revenues that would result from applying the Arkansas rates of 1923 to the gas consumed in Texas; and that defendant adopt Arkansas rates in Texas, though under appeal and though conflicting with the prescribed rates.

"Section IX conflicts with and, if valid, would operate to change the laws of Texas, to deprive the Council of its jurisdiction, to unlawfully abrogate prescribed rates, to delegate and vest in extra-territorial authorities and bodies outside the State of Texas, the non-delegable police or rate power. Moreover, the rates would vary upon contingencies.

"(z) Because of the grounds set forth as to Section VIII-A, *infra*.

"(3) Section IX, even if valid, is not applicable to the situation in the case at bar.

"(a) It is not applicable to the period from June, 1930, to December 1, 1933, it is not retroactive.

"(b) Section IX is not applicable to the period subsequent to November 23, 1933; defendant from and after said date had the right to charge reasonable rates without being limited to the prescribed rates of Section V of the ordinance of June 13, 1930, or to the rates prescribed in 1923, or to any lower rates than those applied for in the City Council of November 3, 1933; defendant exhausted all legislative remedies open to it and under the circumstances plaintiff has no right to enforce confiscatory rates.

"(c) As to the period from December 1, 1933, to February 16, 1934, Section IX is inapplicable; the

rates in Texarkana, Texas, were under contest; and the rates in Texarkana, Arkansas, were in contest.

"(d) As to the period from February 16, 1934, to December 4, 1936, Section IX is inapplicable; the rates in Texarkana, Arkansas, were higher during said period, and are involved in the appeal to the United States Circuit Court of Appeals for the Eighth Circuit. Supersedeas was granted in Texarkana, Arkansas, against any refunds during that period.

"(e) Section IX is inapplicable to the period from December 4, 1936, to any subsequent times; the rates in Texarkana, Arkansas, in said period are under contest and are involved in the appeal to the United States Circuit Court of Appeals for the Eighth Circuit." (R. 153-157).

"(g) Section IX is inapplicable to period of time since January 23, 1935; plaintiff itself on January 23, 1934, gave notice that it would on January 23, 1935, enter upon hearing for change and modification of rates." (R. 158). But no hearings were held and no rate-reducing order was made.

In the case of *Dallas Power & Light Corp. v. Carrington* (Tex. Civ. App.), 245 S. W. 1046, the Court said:

"... An ordinance is a by-law of a municipality passed by its governing body for the regulation, management, and control of its affairs and that of its citizens. Its validity is dependent upon strict compliance with the laws of the state relative to legislative enactments and upon the terms of such city's charter if it has one. It must be clear, definite, and free from ambiguity. Measured by these rules, the ordinance of October 14, 1920, passed by the council of Highland Park, cannot stand. It seeks merely to adopt the provisions of the Dallas franchise relating to service and rate 'in so far as

applicable to Highland Park.' As counsel for appellant facetiously remarks: 'How far is that?' Such ordinance is manifestly too vague and obscure to have any validity, and therefore is void; its meaning not being susceptible of ascertainment. *McQuillin on Municipal Corporations*, Sec. 651; *State v. Cedar-aski*, 80 Conn. 478, 69 Atl. 19; *Chicago I. & L. Ry. Co. v. Salem*, 166 Ind. 71, 76 N. E. 631; *San Francisco Woolen Factory v. Brickwedel*, 60 Cal. 166."

The facts in Texarkana, Arkansas, have been set out in the statement of the case by respondent in this brief under the sub-heading "Events in Texarkana, Arkansas." (pages 6-11).

The rule is that the prescribed rates until set aside are final and controlling upon the utility and the public alike; they are uncontrovertible. See "C. The Rates in Section V of the ordinance of June 13, 1930, are controlling", *supra*.

If Section IX could be held valid, it must be interpreted in the light of that rule. Section IX certainly provides for no refunds. The court is requested in this connection to consider the argument in this brief, *supra*, under subdivision (F), as to asserted discrimination. The *Car-rington Case* therein cited awarded no reparations for past differences in rates, and supports no proposition that would entitle petitioner to recover reparations in the case at bar where respondent on a technicality in a lawsuit in Arkansas was forced to make reparations in Arkansas and to serve for a short temporary interim period of two and one-half months at rates that would confessedly be confiscatory in Texarkana, Texas. Such a situation was not unlawful

discrimination as shown under the sub-heading (F) as to asserted discrimination.

Petitioner has on page 86 asserted to this court that the 45c rate in Arkansas under contest in the Arkansas appeal, is now effective in Arkansas while a \$1.00 rate is being charged in Texas, and thus produced a grossly erroneous impression. The truth is that the rate for the average consumer in Texarkana, Arkansas, under the 45c rate will amount to only about 5c less per 1000 cu. ft. than the average Texarkana, Texas, consumer under the existing rates. And yet for a period of nearly three years the rates were considerably higher in Texarkana, Arkansas, than in Texarkana, Texas.

Petitioner argues that the sense of Section IX was that the reparations for the Arkansas consumers should be held to entitle petitioner to recover reparations in Texas retroactively back to the very date the city council passed an ordinance of June 13, 1930, for application in the city of Texarkana, Texas.

This is not what Section IX says. The condition or effective date set out in Section IX is not to be prior to such time as grantee may have been **finally compelled** to place into effect in the city of Texarkana, Arkansas, less rates than those prescribed in the Texarkana, Texas, ordinance. Only on that condition and only at such time could Section IX apply, even if it were valid. "Then and thereupon, the lessened rate **shall** apply. . . ." This is purely future. No such time has yet occurred under the facts in the record in the case at bar. The contest over the

Arkansas rates was not finally settled and petitioner was not finally compelled or forced to lower rates in Arkansas, when the case was filed or pending in the district court. Petitioner however seeks to go back and upset the rates prescribed in Section V of the ordinance of June 13, 1930, from the very day it was originally passed—in order words, to abrogate it *ab initio*—to prevent it from ever having had any effect whatever, even for one instant of time, and to recover over \$150,000 reparations for the past eight years. Surely no such uprooting of the ordinance and consequent catastrophe to the company is sustainable.

Moreover, the petitioner sought to have the unsettled Arkansas rates enforced in the city of Texarkana, Texas, at the time the case was tried below, and to secure reparations during the pendency of the appeal in the Eighth Circuit. Petitioner admitted:

“So far as the rights of the consumers in Texarkana, are concerned, the court cannot now pass upon them (the rates) from and after February 16, 1934. If the gas company is successful in its Arkansas suit, then there will have been no discrimination from and after February 16, 1934.” (R. 153, 154).

If reparations or reduction from and after February 16, 1934, had been required in Texarkana, Texas, and if respondent had later been successful in the appeal in the Arkansas suit, the prescribed rates in Texarkana, Texas, would become again operative and judgment would have had to go against the gas consumers in Texarkana, Texas, in favor of respondent. If respondent had been required to reduce its rates in Texarkana, Texas, below the prescribed rates, and if the rates in force in Arkansas

from February 16, 1934, to December 4, 1936, had been upheld in the Arkansas appeal, the rate in Texas would of and from said date have been increased to those prescribed in Section V of the ordinance of 1930 automatically and retroactively, and without action by the city council of Texarkana, Texas.

If reparation should be ordered, it would mean that respondent would have to pay out the difference between the revenues collected under the rates prescribed by the city council of Texarkana, Texas, and the calculated revenues that would result from applying the Arkansas rates of May 8, 1923, to the gas consumed in Texas; and that respondent adopt Arkansas rates in Texas, though conflicting with the prescribed rates and though conflicting with any schedule that had ever been adopted in Texas and though introducing into Texas, the Arkansas regulations regarding charges where a meter is cut off for non-payment of bills, or, where connections are changed within twelve months.

Petitioner states that prior to May 30, 1930, the rates in Texarkana, Texas, and Texarkana, Arkansas, were the same, but there were material differences. The rates in Texarkana, Arkansas, prior to May 30, 1930, were those prescribed in an order in that city dated May 8, 1923. These rates were materially different in certain respects from the rates in Texarkana, Texas, prior to May 30, 1930, which were prescribed in an ordinance of March 13, 1923. (R. 64-67). There are no provisions in said Texarkana, Texas, ordinance similar to the payments required in Article E of said Arkansas rates of May 8, 1923. (R. 224).

Section IX, if it should be held to be valid or capable of application under any circumstances, is not applicable to the periods prior to such time as respondent shall have been finally compelled to place into effect in Texarkana, Arkansas, less rates than those set out in Section V.

According to the record in this case the condition of Section IX has not been fulfilled. Respondent has not been finally compelled to place into effect, nor has it voluntarily placed into effect, in the city of Texarkana, Arkansas, any rates less than those prescribed in Texarkana, Texas, in Section V of the ordinance of June 13, 1930. The specified time has not arrived. Respondent did not voluntarily change its rates in Texarkana, Arkansas, but petitioner contends that respondent was finally compelled to do so, which was denied by respondent and confessed by petitioner's motion to dismiss. As a matter of fact the difference in the rates charged in the two cities for the period under review has favored Texarkana, Texas. For a period of nearly three years the rates were considerably higher in Texarkana, Arkansas, than in Texarkana, Texas, although the rates were temporarily somewhat lower in Texarkana, Arkansas, than in Texarkana, Texas, for the short space of two and one-half months required for preparing and filing suit. It was not on the merits of the rates but on technicalities of procedure in litigation in Arkansas that the new suit was required. This short temporary period of two and one-half months lasted only during the time that was required for preparing and filing suit, and when suit was filed, the rates in Texarkana, Arkansas, became considerably higher than in Texarkana, Texas, and so remained for nearly three years and the

litigation for the period is, according to the record, not yet finished, but is still pending. It is obvious that the fact that temporary rates were charged in Texarkana, Arkansas, during the time for preparation of suit does not amount to a final settlement of the rates in Texarkana, Arkansas, nor to a final compulsion, nor to the fulfillment of the condition of Section IX. The controversy was still unsettled in Arkansas; whereas the condition is that grantee shall have been finally compelled to place in effect in Texarkana, Arkansas, rates that are less than those prescribed in Section V of the ordinance of June 13, 1930, in Texarkana, Texas.

The district court's decree held that for the period of time prior to December 1, 1933, no refunds were due, that Section IX was inapplicable to such period, but that Section IX did apply to the temporary short interim period of time from December 1, 1933, to February 16, 1934, on the ground that Section IX required respondent to charge in Texarkana, Texas, the Arkansas rates of May 8, 1923, for said period, and adjudged reparation for said period, R. 234. As to claimed reparations from and after February 16, 1934, the district court held the suit was premature and that petitioner was not then entitled to require reduced rates subsequent to that date, because the condition of Section IX was not fulfilled; because the rates had never been finally compelled, and therefore respondent could not possibly be considered as liable, although the decree stated that it was without prejudice to petitioner's right to institute a new suit, as, if, and when, the city of Texarkana, Arkansas, should win out in its then pending litigation.

The Court of Appeals held that Section IX was inapplicable to any of the periods of time claimed by petitioner, even if Section IX were assumed to be valid. This holding of the Court of Appeals is not due to any strained reasoning, but arises because the language in Section IX is in too plain English to permit a contortion of its meaning to anything else. Petitioner at p. 88 apparently concedes that its interpretation is a contortion of the words, for it desires this court to transpose, reject, and supply words. Petitioner makes the unsupported assertion that Section IX, as it is ambiguous, was to prevent discrimination as to rates against the Texas consumers. If so, the rules of discrimination, as set out in subdivision (F), Point I of respondent's brief, would apply. But if Section IX is ambiguous, petitioner's interpretation and allegations are not to be accepted as true in fact, because respondent in its pleadings denied petitioner's allegations and is to be taken as confessed in view of petitioner's motion to strike out. Respondent denied that Section IX was designed to take care of the situation in the event the Arkansas resolution of May 30, 1930, should be upset by an election in Arkansas. It was never contemplated that referendum was applicable to it. It was understood that the rates prescribed in Section V of the ordinance of June 13, 1930, in Texarkana, Texas, would be binding until such time in the future after reduced rates in Arkansas should be adjudicated, finally compelled, and placed into effect, on the merits of the rates growing out of a new and future application on the part of the Arkansas city, and that was the only contingency contemplated. The reason for this was that the Texas side had borne the expense of the rate hearings in 1930 prior to June 13, 1930, and it was contem-

plated that if future hearings should be had that the Arkansas side would bear the expenses, and that the Texas side should not make any move until after the time and condition had been fully met and respondent shall have been **finally compelled** to place in any rates in the city of Texarkana, Arkansas, less than the rates in Section V of the ordinance of June 13, 1930, and then and thereupon, and only then and thereupon, the lessened rate shall apply to the city of Texarkana, Texas, and grantee should not be authorized or permitted to charge and collect any higher rate.

Section IX says that when the gas company "shall be finally compelled to, or shall voluntarily, place in any rates in the city of Texarkana, Arkansas, less than Texas rates, then and thereupon the lessened rates shall apply in Texarkana, Texas." It is perfectly plain that respondent has never voluntarily lowered its rates on the Arkansas side. Nor had it ever been finally compelled to reduce its rates so far as the record in this case shows. Petitioner in its brief states that certain events have taken place since the trial in the district court and appeal therefrom, but no theory is presented which would authorize them to be brought into this case at this stage, certainly not until petitioner shall have amended its pleadings and shall have incorporated them in the record. Such amended pleading would probably include an allegation that since the decree in the district court and appeal to the Fifth Circuit, the Eighth Circuit had affirmed the federal district court in Arkansas; that thereafter in *Arkansas Louisiana Gas Company v. City of Texarkana, Arkansas*, No. 72, certiorari was refused on October 10, 1938; that then and thereupon respondent was finally compelled to place in

any rates in the city of Texarkana, Arkansas, less than the rates prescribed in the Texas ordinance, and that then and thereupon the lessened rate shall apply to the city of Texarkana, Texas, and that respondent shall not be thereafter authorized nor permitted to charge and collect any higher rate. That date would be the date at which petitioner first could contend that it had a cause of action under Section IX, assuming that Section IX is absolutely valid, capable of the interpretation placed on it by petitioner, and not too vague and obscure for its meaning to be capable of ascertainment. It will be time enough to consider such suit when it shall have been brought. Any action brought prior to that time is bound to be premature. The words "then and thereupon" in Section IX clearly indicate that no rate adjustment on the Texas side will take place until a less rate shall have been adjudicated and finally compelled and placed in effect for Arkansas, and that the Texas side will benefit only prospectively from the time such final compulsion in Arkansas should be enforced, and not retroactively so as to upset business dealings on the Texas side for years back as the petitioner here contends. That respondent had never voluntarily changed its rates or been finally compelled so to do in Arkansas was confessed by petitioner's motion to strike out. The condition of Section IX had therefore never been fulfilled.

Petitioner states that respondent cannot contend that any reason exists why it should be permitted to charge more in Texas than in Arkansas. This assumes a premise that is not present in the case at bar, but, if it were, this whole brief shows the circumstances of this case and many reasons. This has been discussed under subdivision (F), Point I, dealing with asserted discrimination, but the

significant fact is that petitioner is seeking to enforce in Texarkana, Texas, rules and rates that are confessedly confiscatory and that have never been adopted by any regulatory body in Texas. Under the case of *Wabash Valley Electric Company v. Young*, 287 U. S. 488, the unit is the city, and respondent is not permitted to throw the Arkansas distributing plant into a common pool with the Texas distributing plant. A mere difference in rates between two cities, even where similar conditions exist which is denied in the case at bar, does not justify the conclusion that one is too high and one is too low. Particularly is this true where each city comes under laws of two separate and different sovereignties, having different taxes, license fees, occupation taxes, operating conditions, and where few conditions are the same, R. 153. There was no argument of discrimination in the three years when the Texas rates were lower than the Arkansas rates, likely because those now complaining were enjoying then a difference in their favor. The fact is that for rate-making purposes, the facts are different and laws of Arkansas and Texas are altogether distinct and unrelated to each other.

CONCLUSION.

It is therefore respectfully submitted that the decree of the Court of Civil Appeals be affirmed.

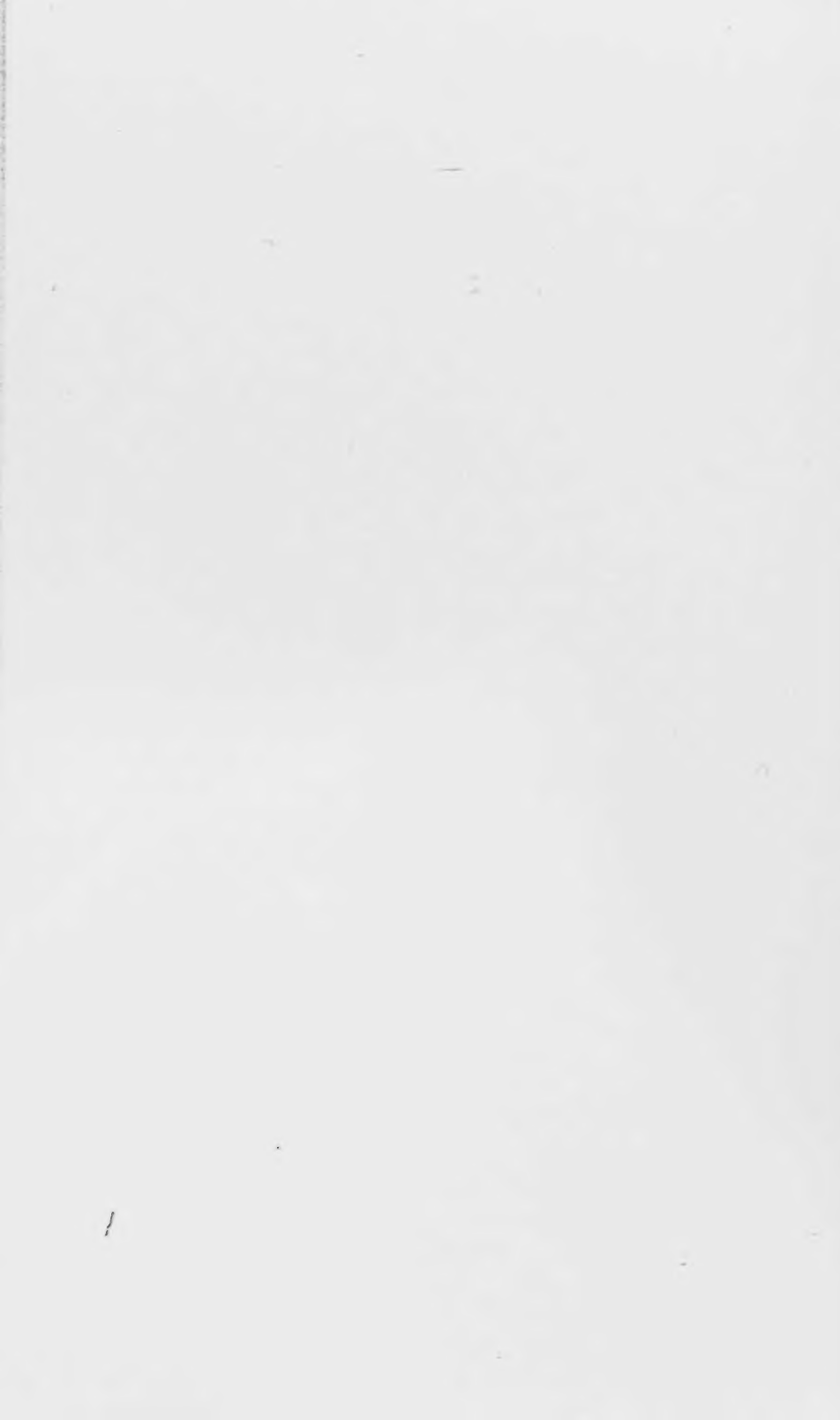
HENRY C. WALKER, JR.,
WILLIAM C. FITZHUGH,
WILLIAM H. ARNOLD, JR.,

Counsel for Respondent.

December 3, 1938.



APPENDIX



CITY CHARTER SECTIONS.

The city charter of Texarkana, Texas (H. B. 743) approved May 2, 1907, is entitled,

"An Act to incorporate the city of Texarkana, Texas, as a city of the first class, as a city of ten thousand and over inhabitants; to grant to the said city a special charter; to repeal all laws in conflict herewith; and declaring an emergency.

"Be it enacted by the Legislature of the State of Texas:

Section 1. That the following described territory, together with the inhabitants thereof, is hereby incorporated for municipal purposes,"

As pleaded by defendant at R. 163, the said city charter contains the following provisions which are the only ones relevant to this case:

Sec. 33. COUNCIL_____ORDINANCE_____TITLE_____The style, title and caption of all ordinances shall be "Be it ordained by the City Council of the City of Texarkana, Texas," but the same may be omitted from ordinances published in book or pamphlet form.

Sec. 34. COUNCIL_____ORDINANCE COMMITTEE_____All ordinances when introduced before the council, except in cases of emergency, shall be referred to an ordinance committee, to be appointed by the council, and such ordinance introduced may be printed for the use of the members of the council, but no ordinance shall be so changed or amended as to change its original purpose.

All ordinances referred to said committee shall be reported back to the council at its next regular meeting, unless otherwise ordered by the council, with the report of said committee thereon annexed thereto.

Sec. 35. ORDINANCE_____READING_____No ordinance shall be passed, except in case of emergency, until the same shall have been read in full in two several meetings of the city council.

Sec. 36. ORDINANCE_____PASSAGE_____No ordinance shall be passed upon the day it is introduced before the council for the first time, except in cases of emergency, and in all cases of emergency the council shall have the power to pass such ordinances as may be deemed necessary under the emergency clause, without referring same to the ordinance committee upon request of the mayor and the vote of the three-fifths of all the aldermen present.

Sec. 37. ORDINANCE_____AYES_____NAYS_____The ayes and nays shall be taken upon the final passage of all ordinances or resolutions, and entered upon the minutes of the council by the city secretary, and every ordinance or resolution shall require for its passage an affirmative vote of a majority of all the aldermen elected, except on ordinances or resolutions granting franchises or levying taxes, in either of which events it shall require for the passage of such ordinance or resolution an affirmative vote of three-fifths of all the members elected to the city council.

Sec. 160. FRANCHISE_____VOTE._____The rights of the City of Texarkana in the use of the public streets, alleys, squares, parks, bridges and all public places are hereby declared to be inalienable to any person, firm or corporation, except by license permit and franchise passed by the city council on the affirmative vote of three-fifths of all the members of said council elected.

Sec. 161. TERM._____No franchise, lease or permit to the use of the streets, alleys, squares, parks, bridges or other public places or the use of either or any of them shall be made by the city council for a longer term than twenty-five years.

Sec. 162. ORDINANCE_____PUBLICATION.

_____Before any grant of franchise shall be made by the council, the terms thereof embodied in the form of an ordinance, as agreed to by the applicant and the council, shall be published in full, for one week next before the date of its passage, in the official newspaper of the said city, and publication to be paid for by the applicant.

Sec. 163. TERMS._____Said proposed franchise shall contain all the terms and agreements between the parties thereto, and it must expressly set forth that the council shall have the right and privilege of regulating and controlling the operation of all business done thereunder, fixing fares, rates, tolls and charges and inspecting the business and work from time to time as it progresses, and rate regulations shall conform to Section 197 of this charter.

Sec. 163a. TERMS._____In the event that any franchise or permit is so given by said council, which shall not contain such stipulations therein as provided for in Section 162 of this charter, then it shall, nevertheless, be considered that all of the said stipulations contained in said Sections 162, 163 and 197 are part and parcel of the said contract and franchise, just as though written therein, and the said applicant so accepting such franchise, as well as their heirs, assigns and successors, shall be held and firmly bound thereto, notwithstanding such omissions. As amended by 31st Leg., passed under emergency clause.

Sec. 164. READINGS_____THREE MEETINGS.

_____No franchise shall be granted under the emergency clause and none shall be granted until after due publication and after being read in full in three several meetings of the city council, and any franchise granted hereunder, which is not in accordance with the provisions of this section, shall be subject to be set aside by any person interested in a suit for that purpose.

Sec. 196. That the city council shall have the power to regulate by ordinance the rates and compensation to be charged by all water, gas, light and telephone companies, corporations or persons using the streets and public grounds of said city and engaged in furnishing water, gas, light and telephone service to the public, and to prescribe reasonable rules and regulations under which such commodities shall be furnished and services rendered, and to fix penalties to enforce such charges, rules and regulations; provided, that the city council shall not prescribe any rate or compensation which will yield less than ten per cent per annum net on the actual costs of the physical properties, equipments and betterments. Said city council may also fix the charges which may be collected for transporting passengers and baggage in vehicles engaged in public service.

Sec. 197. **FARES**_____ **TRANSFERS**_____ The said council shall have the power to require by ordinance under proper penalties that any street or electric railways using any of the streets of the said city shall, for the fare prescribed for one continuous passage, give a transportation transfer from any of its lines to any other line in the city, whether such other line be owned by it or any other company, and in addition to the penalties prescribed by ordinance for the failure to give transfers, shall have the right by mandamus, or other proper remedy in any court of competent jurisdiction, to enforce any ordinance requiring the giving of transfers by any electric railway company.

ARTICLE 1119 REV. CIVIL STATUTES.

Article 1119 Rev. Civil Statutes of Texas enacted in 1907 remained in full force and effect from 1907 until amended in 1937. The amended Article of 1937 is not relevant to this case. We therefore set out the original article.

Article 1119.

Art. 1119 (1018) Rates prescribed, etc.—The governing body of all cities and towns in this State of over two thousand population, incorporated under the general laws thereof, shall have the power to regulate, by ordinance, the rates and compensation to be charged by all water, gas, light and sewer companies, corporations or persons using the streets and public grounds of said city or town, and engaged in furnishing water, gas, light or sewerage service to the public, and also to prescribe rules and regulations under which such commodities shall be furnished, and service rendered, and to fix penalties to enforce such charges, rules and regulations. The governing body shall not prescribe any rate or compensation which will yield less than ten per cent per annum net on the actual cost of the physical properties, equipment and betterments. (Acts 1907, p. 217, par. 1).

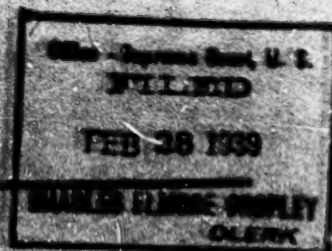
The amendatory act 1931, 42nd Leg., p. 380, ch. 226, par. 1, was held invalid in *Texas-Louisiana Power Co. v. City of Farmersville* (Com. App.) 67 S. W. (2d) 235, rev'g (Civ. App.) 55 S. W. (2d) 195, leaving original act in full force and effect.

ARTICLE 1124 REV. CIVIL STATUTES.

Article 1124 Rev. Civil Statutes of Texas of 1925
is as follows:

Any city having a special charter or a charter adopted or amended under the provisions of chapter 13 of this title, and having authority under its charter to determine, fix and regulate the charges, fares or rates of compensation to be charged by any person, firm or corporation enjoying a franchise in said city, shall in determining, fixing and regulating such charges, fares or rates of compensation, base the same upon the fair value of the property of such person, firm or corporation devoted to furnishing service to such city, or the inhabitants thereof, and not upon any stocks or bonds issued or authorized to be issued, by, or any other indebtedness of, such person, firm or corporation. No city shall be responsible, for, concerned with, authorize, approve or have jurisdiction over, the issuance or sale of any stocks or bonds by any such person, firm or corporation, but the issuance and sale thereof shall be governed solely by the Constitution and laws of this State applicable thereto. (Acts 1st C. S. 1921, P. 152).

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Supreme Court of the United States

OCTOBER TERM, 1938

No. 294

CITY OF TEXARKANA, TEXAS *Petitioner*

vs.

ARKANSAS LOUISIANA GAS
COMPANY *Respondent*

MOTION OF PETITIONER TO AMEND
DECREE

ED B. LEVEE, JR.

BENJAMIN E. CARTER
Counsel for Petitioner

Texarkana, Texas,
February 24, 1939.

Supreme Court of the United States

OCTOBER TERM, 1938

No. 294

CITY OF TEXARKANA, TEXAS.....*Petitioner*

vs.

ARKANSAS LOUISIANA GAS
COMPANY *Respondent*

MOTION OF PETITIONER TO AMEND DECREE

MAY IT PLEASE THE COURT:

Motion

The petitioner, the City of Texarkana, Texas, respectfully moves the Court to amend its decree herein of February 6, 1939, by adding thereto a clause of substantially the following effect:

"It is further ordered that the decree of the United States District Court for the Eastern District of Texas, filed herein on July 31, 1937, be reversed in so far as it held that Section IX of the franchise was not applicable to the period prior to December 1, 1933."

Petitioner suggests that such clause be added immediately preceding the last paragraph of the decree as now written.

Reasons For Motion.

For cause for such motion, petitioner shows:

A.

This court has held, on page 10 of its opinion, that the Texas consumers are entitled to have the lowered rate applied to their consumption for the same periods of time that the Arkansas consumers have enjoyed it.

B.

As stated, on pages 2 and 3 of this court's opinion, the Texas consumers have paid, since 1930, rates which are substantially higher than those finally determined as applicable to the Arkansas consumers. The respondent made refunds to the Arkansas consumers down to the basis of rates lower than the

Texas rates, for the period from 1930 to December 1, 1933.

C.

The decree of the District Court, entered July 31, 1937, held, in part, (R. 146):

"For periods of time prior to December 1, 1933, no refunds are due plaintiff or gas consumers in Texarkana, Texas; Section IX is not applicable to such period."

D.

There is not now any formal decree setting aside this part of the decree of the district court. It may be contended on remand that the district court has no jurisdiction, without such formal order, to set aside this part of its decree.

The decree of this court does two things:

1. It reverses the decree of the Circuit Court of Appeals.
2. It remands the cause to the district court "for further proceedings in conformity with the opinion of this court."

This decree leaves in effect that part of the decree of the district court which ordered refunds for the period from December 1, 1933, to February 16,

1934. The period from February 16, 1934, to date is taken care of by specific directions in the opinion that the district court should, on motion of the city, grant leave to file a supplemental petition to bring to date the controversy over the refund of rates collected subsequent to February 16, 1934.

But there is no specific direction with reference to that part of the decree of the district court which held that the consumers are not entitled to refunds for the period prior to December 1, 1933. If the consumers are entitled to refunds for this period, then the petitioner submits that it is proper for the decree of this court to give some specific direction as to that part of the decree of the district court which held to the contrary.

E.

This part of the decree of the district court was assigned as error by the city on its appeal to the Circuit Court of Appeals (R. 255). It was described in the petition for *certiorari* filed in this court (p.p. 10 & 11), and alleged as error (p. 18) and correction of this error was asked in the prayer in said petition (p. 18). In the city's brief on the merits, it was assigned as error (p. 23) and was argued on p. 84.

* * * *

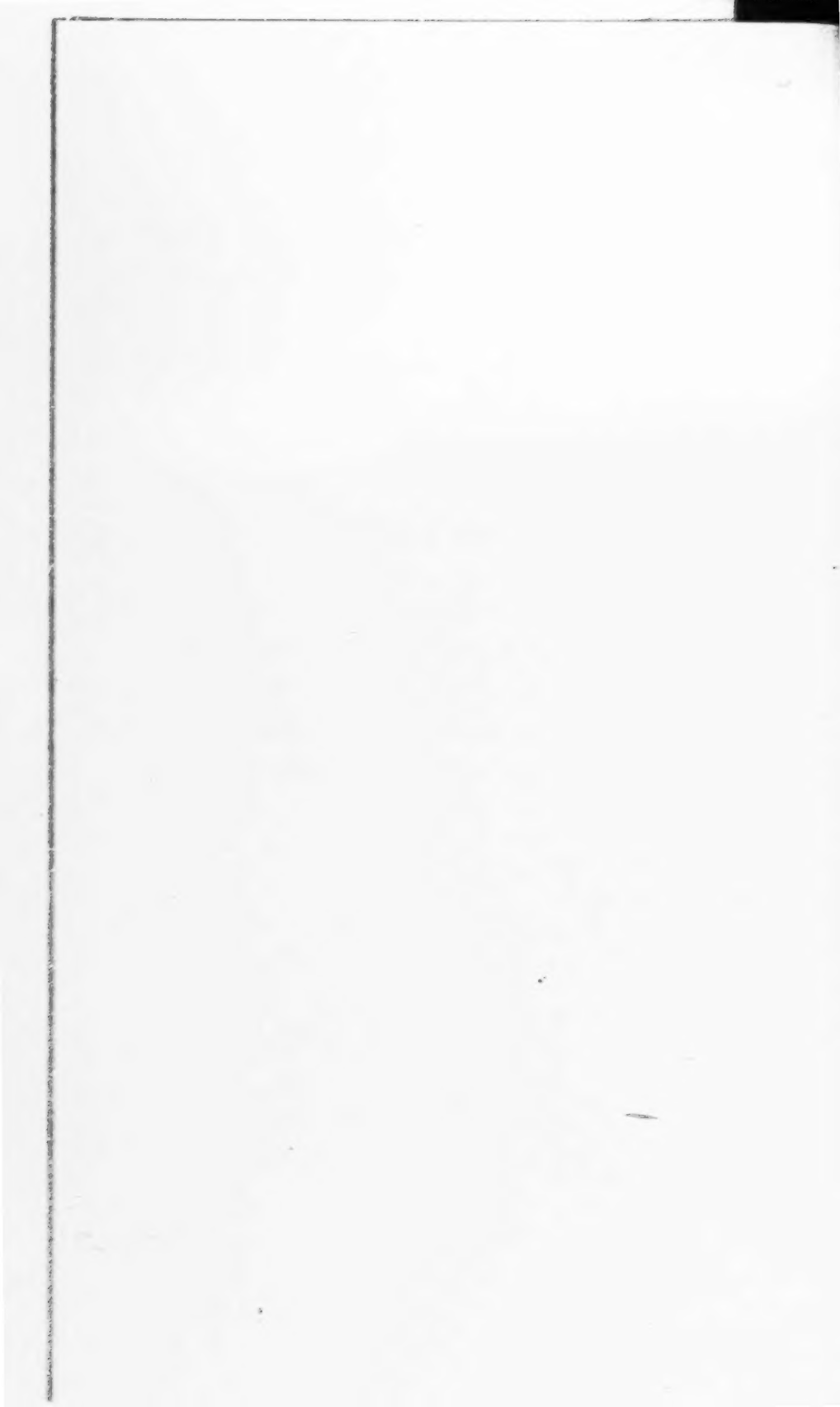
WHEREFORE, the City of Texarkana, Texas,
prays that the decree of February 6, 1939, be amended
as above set out.

Respectfully submitted:

ED B. LEVEE, JR.

BENJAMIN E. CARTER
Counsel for Petitioner

Texarkana, Texas.
Feb. 24, 1939.



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CHARLES CLARKE CROPLEY
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1938.

No. 294.

CITY OF TEXARKANA, TEXAS, *Petitioner,*

v.

ARKANSAS LOUISIANA GAS COMPANY, *Respondent.*

**RESPONSE TO MOTION OF PETITIONER TO
AMEND DECREE.**

H. C. WALKER, JR.,

W. C. FITZHUGH,

W. H. ARNOLD, JR.,

Counsel for Respondent.

Washington, D. C.,

March 8, 1939.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1938.

No. 294.

CITY OF TEXARKANA, TEXAS, *Petitioner*,

v.

ARKANSAS LOUISIANA GAS COMPANY, *Respondent*.

**RESPONSE TO MOTION OF PETITIONER TO
AMEND DECREE.**

May it Please the Court:

The respondent, Arkansas Louisiana Gas Company, herein presents its response to the motion of Petitioner, to amend decree and respectfully shows the following:

The decree entered in this cause reverses the decree of the Circuit Court of Appeals and remands the cause to the District Court "for further proceedings in conformity with the opinion of this Court."

The decree in its present form is a complete direction and order as required by the holding of the Court in the part of the opinion having to do with "Applicability" beginning at page 10 of this Court's opinion.

The effect of the Court's holding is to approve the decision of the District Court (R. 146, 147 and 148) except as to paragraph 3 of the decree (R. 147), with leave granted to Petitioner for filing of a supplemental petition to bring to date the history of the rate controversy on the Arkansas side, thus giving a measure for the refunds to be made on the Texas side.

A portion of the opinion reads, page 10:

"The lower rates for Texas are to be effective only when the utility is 'finally compelled to, or should voluntarily, place in' effect the lower rates for Arkansas. When a rate is voluntarily placed in effect in Arkansas, the Texas consumers are immediately entitled to the same rate. We construe 'finally compelled' as meaning the entry by a court of the final order which makes effective a challenged rate order."

This obviously applies to the period of time after December 1, 1933, and cannot apply to the period prior thereto for the reason that respondent had never been finally compelled to make a reduction on the Arkansas side until after that date. As shown on page 10 of the Court's opinion the only "challenged rate order" of the Arkansas City was that determined by denial of certiorari October 10, 1938.

The Arkansas rates are to become effective in the Texas city only after respondent is "finally compelled." The Court's opinion construes "finally compelled" as meaning the entry by a court of the final order which makes effective a challenged rate order.

Particular attention is directed to the language of Section IX not mentioned in the Court's opinion as further bearing out this viewpoint. The words "then and thereupon" obviously mean and are synonymous with "then" or "at that time". The right of the City of Texarkana, Texas, to have its rates lowered, therefore, became fixed for the first time December 1, 1933.

The effect of the motion to amend decree is to put upon the Court's opinion a construction different than the Court apparently intended and to secure indirectly and by implication what amounts to a change in the Court's opinion. If petitioner was dissatisfied with the Court's opinion a more proper procedure would have been to have applied for rehearing.

On page 7 the opinion states :

"This court looks to the trial court for the original examination of local questions and relies for aid upon the explanation of its conclusion."

We believe that the trial court will understand under the present decree that it is to proceed to a determination of refunds to be given gas consumers in the City of Texarkana, Texas, beginning December 1, 1933, and as may be required by the supplemental petition to be filed by the City of Texarkana, Texas, in accordance with the Court's opinion and that any change in the decree as it now stands will result in an irreconcilable conflict with the opinion of this Court.

It is therefore respectfully requested that motion of petitioner to amend decree be denied.

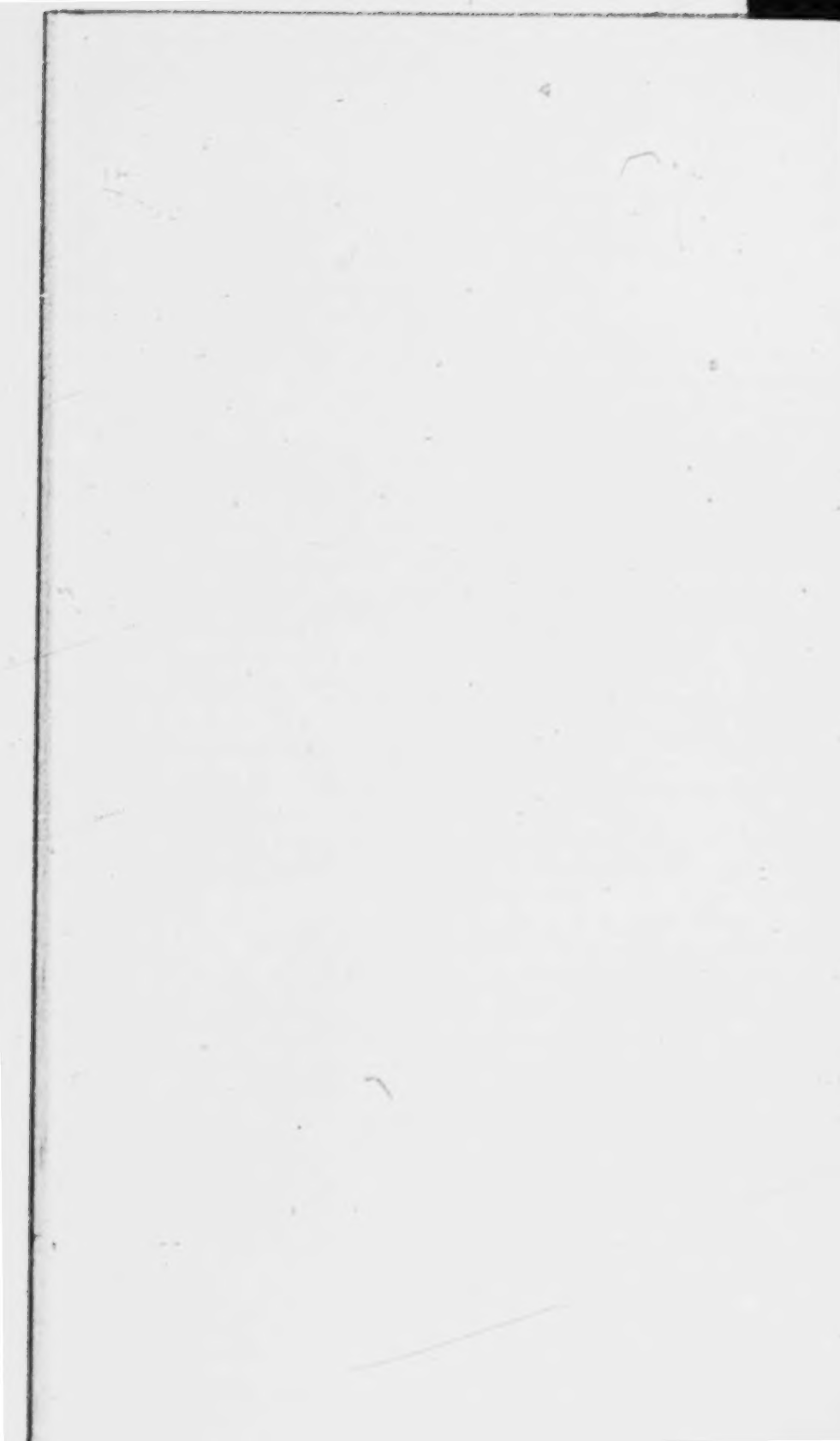
H. C. WALKER, JR.,

W. C. FITZHUGH,

W. H. ARNOLD, JR.,

Counsel for Respondent.

Washington, D. C.,
March 8, 1939.



SUPREME COURT OF THE UNITED STATES.

No. 294.—OCTOBER TERM, 1938.

City of Texarkana, Texas, Petitioner,	}	On Writ of Certiorari to
vs.		the United States Cir-
Arkansas Louisiana Gas Company.		cuit Court of Appeals for the Fifth Circuit.

[February 6, 1939.]

Mr. Justice REED delivered the opinion of the Court.

A writ of certiorari brings to this Court for review a judgment¹ of the Circuit Court of Appeals for the Fifth Circuit denying the validity or applicability of the following section in a franchise granted to respondent by petitioner in 1930. Section IX of that franchise reads as follows:

"If Grantee shall be finally compelled to, or should voluntarily, place [sic] in any rates in the City of Texarkana, Arkansas, less than the rates granted by this Ordinance then and thereupon the lessened rate shall apply in the City of Texarkana, Texas, and Grantee shall not be authorized or permitted to charge and collect any higher rate."

Texarkana, Texas, and Texarkana, Arkansas, are adjacent cities divided by the Arkansas-Texas state line. Respondent serves as a public utility for the distribution of gas in both cities. Because of the section just quoted, the Texas city undertook judicial action to secure gas for itself and its citizens at rates lower than those stated in other sections of the franchise. We granted certiorari² on account of asserted conflict with the decisions of the state courts on an important question of local law.

The charter of the Texas city gives authority to grant franchises for the use of its public ways upon terms to be embodied in ordinances, which must expressly provide that the city shall retain the regulation of the business of the utility, the fixing of its rates and the right to inspect its operations. Should these reservations

¹ Arkansas Louisiana Gas Co. v. City of Texarkana, Texas, 27 F. (2d) 5.

² 305 U. S. —. [October 10, 1938.]

2 *City of Texarkana, Texas vs. Arkansas Louisiana Gas Co.*

be omitted, they are nevertheless to be considered part and parcel of the franchise.³ The charter also provides that the city should have the power to regulate rates charged by gas companies.⁴ The gas company and its predecessors had long held a franchise for furnishing gas to the Texas city. The earliest ordinances of the city were amended in 1923, by which amendment certain rates for gas were fixed. Article E in that ordinance provided that the gas company should "not at any time charge for furnishing gas" to the Texas city "a greater sum . . . than it at the same time charges and collects" from the Arkansas city. On June 17, 1930, the gas company accepted a compromise agreement, in ordinance form, which increased the rates to gas consumers from those set out in the 1923 franchise. This is the ordinance containing the Section IX heretofore quoted and it is the ordinance regulating rates now in effect in the Texas city.

On May 30, 1930, the gas company secured a similar arrangement adjusting rates from the Arkansas city. There had previously been in effect a franchise of 1923 with rates substantially identical with the Texas 1923 rates. The Arkansas franchise of 1930

³ Sec. 160. "The rights of the City of Texarkana in the use of the public streets, alleys, squares, parks, bridges and all public places are hereby declared to be inalienable to any person, firm or corporation, except by license permit and franchise passed by the city council on the affirmative vote of three-fifths of all the members of said council elected."

Sec. 163. "Said proposed franchise shall contain all the terms and agreements between the parties thereto, and it must expressly set forth that the council shall have the right and privilege of regulating and controlling the operation of all business done thereunder, fixing fares, rates, tolls and charges and inspecting the business and work from time to time as it progresses, and rate regulations shall conform to Section 197 of this charter."

Sec. 163a. "In the event that any franchise or permit is so given by said council, which shall not contain such stipulations therein as provided for in Section 162 of this charter, then it shall, nevertheless, be considered that all of the said stipulations contained in said Sections 162, 163 and 197 are part and parcel of the said contract and franchise, just as though written therein, and the said applicant so accepting such franchise, as well as their heirs, assigns and successors, shall be held and firmly bound thereto, notwithstanding such omissions."

⁴Sec. 196. "That the city council shall have the power to regulate by ordinance the rates and compensation to be charged by all water, gas, light and telephone companies, corporations or persons using the streets and public grounds of said city and engaged in furnishing water, gas, light and telephone service to the public, and to prescribe reasonable rules and regulations under which such commodities shall be furnished and services rendered, and to fix penalties to enforce such charges, rules and regulations; provided, that the city council shall not prescribe any rate or compensation which will yield less than ten per cent per annum net on the actual costs of the physical properties, equipments and betterments. Said city council may also fix the charges which may be collected for transporting passengers and baggage in vehicles engaged in public service."

was subjected to a referendum and to prolonged litigation. Eventually, on December 1, 1933, a final order set aside the 1930 ordinance of the Arkansas city and established the rates of the 1923 ordinance as effective for the consumers of the Arkansas city from 1930 to the date of the decree. This decree also required refunds to the Arkansas consumers for overpayment during that period.⁵ By further litigation, a resolution of the council of the Arkansas city of December 22, 1933, promulgating rates for the future was upheld.⁶ These last rates were the 1923 rates, modified in minor particulars. In the order of December 4, 1936, confirming the rates established by its resolution, the gas company was directed to refund to the consumers any overpayment by reason of the collection of higher rates during this last judicial proceeding. It thus appears that the legal rates to the consumers of the Arkansas city at all times have been substantially those of the 1923 ordinance.

In Texarkana, Texas, the consumers have paid since 1930 the rates fixed in that ordinance, which are substantially higher than those finally determined as applicable to the Arkansas consumers. The gas company in October, 1933, sought from the Texas city council rates still higher than those granted by the 1930 ordinance. The company gave notice that on November 23, 1933, a new and higher schedule of rates than those provided in the 1930 agreement would be established in the Texas city. The Texas city sought and obtained in the state court an injunction against this increase. This is still effective. This suit was removed to the Federal district court for Texas. The bill was amended on January 15, 1934, to set up an additional cause of action against the gas company by reason of the entry of the decree on December 1, 1933, in the Arkansas litigation. As this decree was a final order determining that the Arkansas consumers should pay only the 1923 rates, the Texas city conceived its citizens should have the benefit of the same lower rates by virtue of Section IX. It was further sought by this amendment to recover for the affected time a refund for the Texas consumers equal to the difference between the Arkansas rates, as determined by the decree of December 1,

⁵*Arkansas Louisiana Gas Co. v. City of Texarkana, Texas*, 97 F. (2d) 5, 6, col. 2; cf. *Southern Cities Distributing Co. v. Carter*, 184 Ark. 4, appeal dismissed 285 U. S. 525, 526; *City of Texarkana, Arkansas v. Southern Cities Distributing Co.*, 64 F. (2d) 944, cert. denied 290 U. S. 650.

⁶*Arkansas Louisiana Gas Co. v. City of Texarkana, Arkansas*, 17 F. Supp. 447; affirmed 96 F. (2d) 179; cert. denied October 10, 1938.

4 *City of Texarkana, Texas vs. Arkansas Louisiana Gas Co.*

1933, and the Texas 1930 rates. Later, on December 30, 1936, a supplemental bill was filed to set out the further claim of the Texas city consumers, for the period between that covered by the first amendment and the filing of the supplemental bill, together with a prayer that the gas company be compelled to pay into the registry of the court the excess amount which it was alleged it had and was continuously collecting from the Texas consumers. Immediate distribution was asked for the funds applicable to those periods concerning which no further Arkansas litigation was pending.

The situation from the standpoint of the Texas city might be summarized by saying that it seeks for its consumers the lower 1923 Arkansas rates instead of the Texas 1930 rates, from the effective date of the Arkansas resolution of May 30, 1930, to February 16, 1934. This refund is claimed because the Arkansas consumers obtained these lower rates by the Arkansas decree of December 1, 1933, and the voluntary act of the gas company in collecting the lower rates from the date of the decree to February 16, 1934. On final affirmance of the Arkansas litigation, it seeks refunds for its consumers from February 16, 1934, to December 4, 1936, of the difference between the Texas 1930 rates and the Arkansas December 22, 1933, rates. This refund is claimed because of the decree of December 4, 1936,⁷ validating for the Arkansas consumers the rates of the 1933 resolution. These rates were substantially the same as those fixed in the 1923 ordinance. As an injunction, pending appeal, was refused, these lower rates have been in effect in Arkansas since the date of the decree. As pointed out above, the decree was affirmed by the Circuit Court of Appeals and certiorari refused here. It is further sought to have put into effect in Texas the rates collected in Arkansas after December 4, 1936. The right to the lower rates and to the refund depends upon the interpretation of Section IX.

Another bill was filed by the Texas city in May, 1934, seeking substantially the same relief as that sought in the proceeding heretofore detailed. The reasons for the filing of this second suit and its purpose are not material to the present proceeding. The two actions were consolidated. Later motions, pleadings and the decree in the two cases are the same.

⁷ United States District Court, Arkansas: *Arkansas Louisiana Gas Company v. City of Texarkana, Arkansas*, Cause No. 219.

The gas company filed answers to the bills set out above and a counterclaim seeking higher rates. Section IX was challenged as invalid because of conflict with the provisions of the city charter, the laws and constitution of Texas. It was asserted that the section was not a binding contract on either party to the franchise and further asserted that if Section IX was valid, it was inapplicable to any of the three periods for which the Texas city sought relief and refund. The district court granted the city's motion to strike the answers and counterclaim and, the gas company declining to amend, decreed that Section IX was a binding contract between the parties; that it was inapplicable to the period prior to December 1, 1933; that refund should be made from December 1, 1933, to February 16, 1934; and that the suit was premature as to the period after February 16, 1934, because an appeal was pending in the Circuit Court of Appeals for the Eighth Circuit at the time the second amendment was filed by the Texas city on December 30, 1936. The Circuit Court of Appeals reversed and remanded with directions to dismiss the bill.⁸ It thought that Section IX was an invalid abdication or delegation of the Texas city's rate-making power since the section purported to bind both parties to lower rates which might be fixed by the gas company and the Arkansas city. The lower court stated also, without discussion, that the clause was inapplicable even if valid. The petition for certiorari relies upon the alleged error of the lower court in deciding that the section was invalid and inapplicable.

Abdication or delegation of regulatory power. By the act to incorporate the city of Texarkana, Texas, the legislature granted a special charter which contained delegations of power to the municipality to contract for utilities and to regulate gas rates, and prohibitions against the granting of a franchise without specific reservation of this power of future regulation.⁹ The respondent takes the position that since Section IX not only requires the application of lower Arkansas rates to Texas consumers but provides that the gas company "shall not be authorized or permitted to charge and collect any higher rate," the Texas city has abdicated power to raise the Texas rates above the Arkansas rates. As the Texas city is forbidden to give up the power to regulate rates, the section, says the company, is invalid.

⁸ *Arkansas Louisiana Gas Co. v. City of Texarkana, Texas*, 97 F. (2d) 5.

⁹ The provisions are set out in notes 3 and 4, *supra*.

6 *City of Texarkana, Texas vs. Arkansas Louisiana Gas Co.*

The city agrees that any delegation or abdication of complete power to regulate rates would be unlawful and any provision of a franchise leading to that result invalid under the decisions of Texas.¹⁰ It is the petitioner's position, however, that a proper interpretation of the section leaves with the city the unimpaired power to regulate the gas rates, within the limits of the applicable constitutional provisions. We agree with this analysis of the section. The words just quoted prohibiting the charge or collection of higher rates more reasonably imply a limitation on the right of the gas company to look to other provisions of the franchise for authority to exact other rates. But if this view is not accepted, it is quite clear that the charter provision 163a retaining the right to regulate must be read into the franchise. This would result in leaving in the council of the Texas city the power to raise or lower the gas rates.

Nor, in this view, can it be said there is delegation as distinct from abdication of the power to regulate. It is true, extra-state action determines that the rate shall lessen but the council has power over the rates at all times. The Arkansas rate is a mere measuring rod, as though the rate fluctuated with temperature or consumption. Even if Section VIII-A¹¹ is valid, in the face of sections 163, 163a and 196 of the charter, it is inapplicable, by its terms, to the power of the city to increase rates.

The obligation of the utility under Section IX. As the lower court determined Section IX is wholly invalid as a delegation and abdication by the city of its rate making powers, there was no occasion for it to consider whether the section was binding upon the utility alone. With the conclusion that the city is free to raise or lower the rate, in the public interest, we must inquire whether the gas company is bound to furnish Texas consumers their gas at the lessened Arkansas rates. The determination follows the state

¹⁰ *City of Uvalde v. Uvalde Elec. & Ice Co.*, 250 S. W. 140; *Texas Gas Utilities v. City of Uvalde*, 77 S. W. (2d) 750; *Nairn v. Bean* (Conn. 1932), 48 S. W. (2d) 584, 586; cf. *Railroad Comm'n v. Weld & Neville*, 96 Texas 405; *Missouri-Kansas & T. R. Co. v. Railroad Comm'n*, 3 S. W. (2d) 489, 493; *Green v. San Antonio Water Supply Co.* (Civ. App.), 193 S. W. 453.

¹¹ Section VIII-A. "In consideration of the granting of this franchise, it is mutually agreed and understood by and between the parties hereto that before the City Council of said City shall apply for a reduction in rates, or before the Southern Cities Distributing Company, its successors or assigns, shall make application for an increase in rates, either party shall give to the other party one year's notice in writing of its intention to so apply for an increase or decrease in rates, and no application for increase or decrease in rates shall be acted upon or considered unless said one year's notice is first given before making such application."

law.¹² This court looks to the trial court for the original examination of local questions¹³ and relies for aid upon the explanation of its conclusion. While no opinion was written in the trial court, its decree found Section IX a "binding contract" and awarded recovery for a portion of the time involved. Assuming the district court agreed with this Court that the city could not and did not delegate or abdicate its rate making function, this necessarily required a holding that the company alone was bound by this section of the contract. An appeal, with specific assignment of this ruling as error, brought the case to the Circuit Court of Appeals and the point is argued here by respondent as justification for the judgment reversing the District Court.¹⁴ Under these circumstances, we feel constrained to pass upon the question.¹⁵

It cannot be said that any opinion of the Supreme Court of Texas settles the problem of whether a utility is bound to a contract for a schedule of rates when the municipality is not. That court, in 1925, in *Dallas Railway Co. v. Geller*, did state that an ordinance on rates is a contract.¹⁶ There had been a franchise with a fixed maximum rate. The municipality granted an increase. A citizen objected on the ground that the franchise, as a contract, bound the municipality and the utility to the agreed rate. The Court of Civil Appeals¹⁷ held the rate section of the franchise was not a "fixed contract" but a rate schedule, subject to the city's power of regulation by reason of Section 17 of Article 1 of the Texas Constitution forbidding uncontrollable grants of special privileges. On review, the Supreme Court stated that a question had been raised by city attorneys, appearing as amici curiae, as to the meaning of the language of the lower court which was construed by some to hold that "a municipality cannot make contracts that are binding upon public service corporations."¹⁸ While the court could have avoided comment on the point upon the theory that whether or not there was a contract,

¹² Sec. 34, Act of September 24, 1789, c. 62, 1 Stat. 73, 92, 28 U. S. C. A. 735; *Erie R. Co. v. Tompkins*, 304 U. S. 64; *Southern Iowa Elec. Co. v. Chariton*, 255 U. S. 539, 543; *R. R. Comm'n v. Los Angeles R. Co.*, 280 U. S. 145, 151.

¹³ *R. R. Comm'n v. Los Angeles R. Co.*, 280 U. S. 145, p. 164 dissent, n. 1.

¹⁴ *Langnes v. Green*, 282 U. S. 531, 538.

¹⁵ Cf. *Buhh v. New York Life Ins. Co.*, 304 U. S. 202, 206.

¹⁶ 114 Tex. 484, 271 S. W. 1106.

¹⁷ *Geller v. Dallas Ry. Co.*, 245 S. W. 254, 256.

¹⁸ It was stated in petitioner's brief and not denied that after the decision in *Uvalde v. Uvalde Elec. & Ice Co.*, 250 S. W. 140, discussed in the next paragraph, briefs were filed in the Supreme Court in the *Geller* case arguing the effect of the *Uvalde* decision.

the city's regulatory power was unaffected, it chose to interpret the franchise in the light of the contract in these words: "The right or power to further control or regulate the grant in regard to the rate schedule is a reservation to the municipality and not an inhibition to contract; and where a franchise is accepted by a grantee, this reservation . . . becomes a part of the contract." Later the Supreme Court, in discussing the power of the legislature to authorize specifically binding rate contracts for definite periods, citing the *Uvalde* case, said, "It is well established in this state that the Legislature may authorize municipal corporations to enter into contracts" for rates for limited periods.¹⁹ We reason from these opinions that in Texas a utility franchise is a contract, with an express or implied provision that the rate schedules are subject to regulation by the city. In such a contract an agreement by the utility to lower rates under specified conditions is binding, although the rule as to the reserved power of regulation prevents the city from agreeing not to raise or lower rates. Grant of the franchise is consideration for the undertaking of the utility to maintain the prescribed rates until they are altered by the exercise of the reserved power of the municipality to regulate the rates.

The case of the *City of Uvalde v. Uvalde Electric and Ice Co.*, 1923,²⁰ is suggested as an authority against interpreting a rate contract, invalid as to the city, as binding upon the utility. Uvalde, without power to contract for rates, did so contract. The utility raised the rates without permission. The court was of the view that "the power to regulate rates and the power to stipulate by contract for a term of 10 years for rates cannot coexist." Looking at the contract in this way and without discussion of the effect of the attempted agreement on the utility, an injunction against the new rates was refused. That case appears rather a precedent for the rule that where a city is not authorized to contract as to rates but only to regulate them, any effort to contract is nugatory. As indicated above, it has been cited by the Supreme Court of Texas as authority for the right of a municipality to contract when so empowered.

This Court has had other occasions to consider the rights of Texas utilities under the provisions of the Texas statutes

¹⁹ *Lower Colorado River Authority v. McGraw*, 83 S. W. (2d) 629, 638, 125 Texas 268.

²⁰ 250 S. W. 140. Compare *Texas Gas Utilities v. Uvalde*, 77 S. W. (2d) 750, 752.

and constitution. In *San Antonio Traction Co. v. Altgelt*²¹ we assumed a rate contract between the city and the street railway, and ruled that it was subject to Section 17 of the Texas bill of rights,²² which declared that all privileges granted by the legislature remained under its control. Consequently, an enactment changing the rate agreement was valid. Later, 1920, in *San Antonio v. San Antonio Pub. Serv. Co.*²³ in passing upon a rate increase by a utility in the face of a franchise limitation we ruled that Section 17 of the constitution, with its provision against irrevocable special privileges, made impossible a contract in Texas on rates because of the conflict between the right to contract and the superior and inconsistent power to regulate. To the argument that the company might be bound, though the city was not, the court replied: If the city is not bound "it would follow that that power [uncontrolled regulatory] would be required to be exerted and hence the supposed condition operating upon the private owner would be nugatory."²⁴

These conclusions of this Court are inapplicable here for two reasons: first, the subsequent opinion of the Supreme Court of Texas in the *Geller* case indicates that regulatory and contract power may be exercised concurrently in that state; second, the charter of Texarkana, Texas, gives it specific power to enter into franchise agreements with rate regulation reserved to the city.²⁵ The utility was chargeable with notice in 1930 of the rule in Texas, restated in the Texarkana charter, that rate regulatory power remains in the municipality and the charter provision to that effect was reserved in the franchise by force of law. It contracted, nevertheless, to furnish the Texas city gas at the same rates as Arkansas consumers enjoy. There appears no reason why such an agreement should not be enforceable and, in our view of the Texas law, it is.

²¹ 200 U. S. 304, 308.

²² Constitution of State of Texas, Bill of Rights, Vernon's Texas Statutes 1936, XXV, Sec. 17. "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof."

²³ 255 U. S. 547, 555.

²⁴ Cf. *R. R. Comm'n v. Los Angeles R. Co.*, 280 U. S. 145, 151. But cf. *Southern Utilities Co. v. Palatka*, 269 U. S. 232, 233.

²⁵ Sections 163, 163a, 196, notes 3 and 4, *supra*.

Applicability. The trial court determined that Section IX was not to be applied to the period prior to December 1, 1933; that it should be applied to the period December 1, 1933, to February 16, 1934, and that the effort to recover refunds for the period after February 16, 1934, was premature. The Circuit Court of Appeals thought the section, if valid, generally inapplicable. We are of the opinion that the language of the section was intended to and does make applicable to each Texas consumer the same rates that Arkansas consumers are charged for similar uses and quantity, when the Arkansas rates are lower than the rates granted Texas consumers by the ordinance of the City of Texarkana, Texas, of June 13, 1930. This flows from the words in Section IX "place in any rates" less than the Texas ordinance rates.

The lower rates for Texas are to be effective only when the utility is "finally compelled to, or should voluntarily, place in" effect the lower rates for Arkansas. When a rate is voluntarily placed in effect in Arkansas, the Texas consumers are immediately entitled to the same rate. We construe "finally compelled" as meaning the entry by a court of the final order which makes effective a challenged rate order. No right to demand the lower rate and no cause of action to enforce the right arises until that time. When such order is entered, however, the Texas consumers are entitled to have the lowered rate applied to their consumption for the same period of time it is enjoyed by the Arkansas consumers. The purpose of the clause was to give Texas consumers the advantage of lower Arkansas rates for similar periods of time. Litigation, regardless of its merit, may not stay the beginning of the lower Texas rate. In our view, so much of the relief sought as was based upon the challenged rate order of December 22, 1933, was premature.²⁶ As there was an appeal from the decree of December 4, 1936, it was ineffective to create a cause of action when the supplemental petition of December 30, 1936, was filed.

Leave to file a supplemental petition to bring to date the controversy over the refund of rates, collected subsequent to February 16, 1934, should be granted, upon the return of the case to the District Court, on motion of the City of Texarkana, Texas. The present action is an appropriate proceeding for the settlement of the entire rate controversy and the refund of such sums as may be de-

²⁶ *Atl. & Pac. Tea Co. v. Grosjean*, 301 U. S. 412, 429.

terminated, ultimately, to be due the Texas consumers.²⁷ Where there is a good cause of action stated in the original bill, a supplemental bill setting up facts subsequently occurring which justify other or further relief is proper. If the original decree in the trial court had not been entered, this supplemental petition would simplify the controversy.²⁸ We think this procedure is equally applicable after remand for further proceedings.²⁹

Other suggestions to support the respondent's position that Section IX is invalid are made. It is said that it is vague, indefinite and obscure. These have been answered by what we have written. The issue of confiscation tendered by the answer of the utility to the petition to enforce the obligations of Section IX need not be considered in this proceeding. If the utility has entered into a binding contract as to rates, their confiscatory character is not a defense to the claim of the city to service at the contract rates.³⁰

Reversed.

Mr. Justice McREYNOLDS and Mr. Justice BUTLER are of opinion that the decision of the Circuit Court of Appeals is right and that its judgment should be affirmed.

Mr. Justice FRANKFURTER took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

²⁷ Rule 15d, District Court Rules, September 1, 1938. Cf. Rule 34, Federal Equity Rules, 1912.

²⁸ *N. Y. Security & Trust Co. v. Lincoln St. Ry. Co.*, 74 Fed. 67, 68; *Banks Law Pub. Co. v. Lawyers' Coop. Pub. Co.*, 139 Fed. 701; *Kryptok Co. v. Haussmann & Co.*, 216 Fed. 267; *Milo Manor, Inc. v. Woodard*, 92 F. (2d) (CCA D.C.) 220, 223. Cf. *Clarke v. Boysen*, 264 Fed. 492, 496, a closed account cannot be reopened.

²⁹ Cf. 2 Daniell's Chancery Pleading and Practice, 6th Am. Ed., pp. 1536, n. 6, and 1537. For further action after decree, see *Mitchell Coal Co. v. Penna. R. R. Co.*, 230 U. S. 247, 266; *Morrisdale Coal Co. v. Penna. R. R. Co.*, 230 U. S. 304, 314; *Rio Grande Dam Co. v. United States*, 215 U. S. 266, 274.

³⁰ Cf. *Public Service Co. v. St. Cloud*, 265 U. S. 352; *Henderson Water Co. v. Corp. Comm'n*, 269 U. S. 278; see *Southern Iowa Elec. Co. v. Chariton*, 255 U. S. 539, 542; *Paducah v. Paducah Ry. Co.*, 261 U. S. 267, 272-73; *Ga. Ry. & Power Co. v. Decatur*, 262 U. S. 432, 438-39; cf. *Columbus Ry., Power & L. Co. v. Columbus*, 249 U. S. 399, 410.